AMERICAN BAR ASSOCIATION

JOVRNAL

FEBRUARY, 1929

Status of the Lien of Federal Judgments
By W. T. STOCKTON

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Air Law—The New Field
By W. JEFFERSON DAVIS

Federal Judge Leaves Fund to Association

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Imagine your wife seeking a job in order to support herself and the children; going from office to office—and always receiving that same answer. "Sorry, but we're not taking on anyone at present. Leave your name and address, and we'll let you know, if anything turns up."

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Would the life insurance and other investments which you now own yield enough to enable your wife to run your home without the help of your personal earnings?

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CVRRENT EVENTS

National Economic League Referendum

THE results of the recent referendum on the "Administration of Justice" taken by the National Economic League have just been made public. A questionnaire was sent to the members of its National Council, and over one thousand replies, representing every state in the Union, were received. Twenty-two main questions were submitted, and a summary of the opinions expressed is contained in the statement issued by the organization.

This statement shows that 818 favor the establishment of permanent State Judicial Councils, as against 100 who do not think it necessary; that seventy percent of those replying favor an appointive rather than an elective judiciary, and "most of those approving the latter hold that elections should be by means of a separate non-partisan, non-political ballot"; that "unification of the judicial system and specialized branches of the courts with specialist judges in the larger cities are overwhelmingly favored. More than eighty-five percent approve the proposal to give trial judges power to sum up the evidence orally, and to comment upon its weight and the credibility of witnesses. A smaller majority is registered for the proposal to allow courts of appeal to receive new evidence, to make new findings of facts, and to enter final judgments based on such evidence or findings."

The statement further records over ninety percent of the vote as in favor of giving the defendant in a criminal case the right to waive a trial by jury, but adds that one-fourth would except capital cases, while three-fourths advocate three judges in such cases. Three-fifths hold that a defendant in a criminal case should not be required to take the stand, but that comments on his failure to testify should be allowed. The vote was nearly unanimous in favor of enabling less than twelve of the jury to return a verdict in civil cases, and three out of four of the replies favored the same plan for criminal cases. Sixty-five percent favored not excepting capital cases from the rule. A majority favored giving nine jurors the right to return a verdict. Eighty percent of the voters expressed the view that "mental capacity of a person to be tried should be determined by disinterested experts, and the question of irresponsibility should be passed upon by the court rather than by the jury."

The referendum further disclosed a strong opinion in favor of higher requirements for admission to the Bar and for an official organization of the entire Bar of each state, with powers of discipline, subject to judicial review or appeal (616 for, 227 against). "Eighty-five percent of the members urge that two years of college work as recommended by the American Bar Association be exacted for admission to the Bar. A larger percentage believe that there should be an examination on character and fitness as well as on knowledge of rules of law, and that there should be educational requirements other than knowledge of law."

Standing legislative counsel to improve the technique of law-making, "greater uniformity in state laws on many subjects, conversion of many violations of law now called crimes, but punishable only by fines, into civil offenses involving liability to the state without criminal record also carry majority recommendations. State legislation for public defenders is favored by a narrow margin, and there is an almost equal division of opinion, 433 against 428, as to whether district attorneys should be appointed or elected. While a majority favor retention of the grand jury system, the trend of opinion is toward a limitation of grand juries' attention to more serious cases. Seventy percent of the members voting favor making agreements to arbitrate business disputes enforceable by summary procedure.

Problem of Fee-Charging Employment Agencies

THE recent decision of the Supreme Court of the United States in Ribnik vs. McBride (48 Sup. Ct. 545) has created a situation that is causing con-

cern to those who have given attention to the problems raised by the fee-charging employment agencies. It will be recalled that six of the nine Justices held that an employment service is not sufficiently charged with a public interest to justify the official fixing of the fees to be charged. This decision, according to an article by John B. Andrews, Secretary of the American Association for Labor Legislation, "lessens public control of a business that to the general public has been known chiefly because of its abuses," and creates an emergency which renders prompt action necessary.

"We learn from every investigation that commercial agencies, which make a business of charging fees for the service of finding jobs for unemployed wage-earners, are under certain peculiar temptations," says Secretary Andrews. "An employment agency may be opened with the outlay of but little capital and the current expenditures may be very small. The least desirable of these agencies are often operated by persons without special training or skill in conducting a business of great importance to the community. Such agencies frequently deal with the weakest members of the community who, either through lack of understanding of their rights under the law, or because of their urgent need of a job, are no match for the cunning of the unscrupulous agency manager. The relationship between the agency and the applicant for work is usually not a continuous one, and the unscrupulous manager is therefore not to the same degree as in most businesses under the necessity of maintaining the good will of his constantly changing customers."

Mr. Andrews then lists, among the principal well known forms of abuse: misrepresentation, petty graft, deliberate encouragement of labor turnover, refusal to return fees when no help is rendered, and immorality, under which last head he mentions "sending women to houses of ill-repute or similar resorts." He adds:

"A year ago the American Association for Labor Legislation wrote to state officials throughout the country calling attention to the attack then being organized by the fee-charging agencies against their regulation by the states. In many cases—although there were a few exceptions—the state officials then appeared quite unconcerned. And inasmuch as the Attorney General of New Jersey was then supremely confident of his ability to handle the legal case without any outside assistance, little could then be done. At the end of May when the destructive Supreme Court decision (Ribnik vs. McBride) was handed down, another communication was sent and the interest by this time was keener. But in some states there still appears to be a lack of full understanding that, unless there comes a reversal of the highest Court's divided opinion, in future the fees charged by employment agencies cannot be limited by the state. . . .

"But improved regulation, through licensing, is now—with competition—the most practicable means of directly meeting the immediate problem. Three points —judging from experience, and for legal reasons—should be bound up together in future state legislation for this purpose. Before a license is granted the appropriate state authority should be satisfied, through a public hearing, as to: 1. The character of the applicant. 2. The suitability of the premises. 3. The community need for a new agency. These provisions have worked well in several countries of Europe, and in Wisconsin for fifteen years. New Jersey—the only state having a legislature in session since the recent

Supreme Court's decision—has also adopted this method of regulation."

A Gilbert and Sullivan World Court

THE World Court, conceived in a Gilbert and Sullivan fashion, furnished the setting for the Chicago Bar Association's annual Christmas entertainment. It was entitled "Christmas Spirits, 1928," and followed the annual holiday dinner on Tuesday, Dec. 18, and Wednesday, Dec. 19, in the Association Club Rooms. There were five Justices of the World Court representing five different nations and each engrossed with the superior importance of his own country. The jurisdiction of the court was really extraordinary, covering not only all international matters but also a variety of local causes. In fact, one of the most important figures before it was one Joe Saltis, of much local disrepute but with a heretofore uncanny ability to avoid unpleasant consequences of contact with the law. The World Court treated him with the expected unusual consideration. The jurisdiction being thus extended, occasion was found for appearance before the Court, on one pretext or another, of professional reformers, medical experts and other familiar figures. The "flu" had made an effort to decimate the cast just before the first performance, but substitutes were found and the management rose superior to the threat. The performance showed a good deal of singing and dramatic talent and was thoroughly enjoyed by audiences which packed the hall for two successive evenings. Political hits were much enjoyed, among them being a song beginning "How ya gonna keep 'em down on the farm after they've had relief?" and another, by "Mabel," entitled, "The Beverage to Drink Comes Down from the Sky."

Tribute to Charles Evans Hughes

HON. CHARLES EVANS HUGHES, President of the Association of the Bar of the City of New York and a member-elect of the Permanent Court of International Justice, will be the guest of honor at a reception and banquet on January 25, given by the Bronx County Bar Association. The function will be not only a recognition of the high international honor that has come to him but also a "tribute to his efforts to bring about better co-operation among the local Bar Associations," according to the announcement recently made. Many prominent speakers and guests will be present. The exact date of Judge Hughes' departure to The Hague has not been given out, but it will be some time in May.

Divorce Attractions of Yucatan and Campeche

LATIN-AMERICAN desire to help Americans solve their divorce difficulties is freshly illustrated by a circular just received from one Francisco Arcovedo Guillermo, whose stationery proclaims him as an Attorney and Counsellor at Law of Merida, Yucatan. It may be recalled that a year or so ago we printed a public invitation from a lawyer in Sonora who pointed out, in effect, that under the laws of that state one could be divorced from his or her spouse almost as easily and quickly as one could be separated from his money at Tia Juana. The Yucatan attorney not only sets out engagingly the character of the divorce laws of Yucatan and the neighboring state of Campeche, but also offers his services in meeting clients at the wharf on their arrival, assisting them through the customs, and securing suitable hotel accommodations. This extension of the professional function cannot fail to appeal to those inexperienced in travel as well as in getting divorces.

In order that the Yucatan attorney's ideas and plans may not suffer from our inadequate explanation, we print the circular in question, only omitting, from considerations of space, the digest of the Campeche law. It is proper to say, however, that nothing simpler in the way of a divorce procedure appears to have been devised than this particular law. We are preserving the "Españolisms" in spelling in the circular, as they do much to convey the local atmosphere to the reader:

TO WHOM IT MAY CONCERN:

In 1923 the Legislature of the State of Yucatan promulgated a Law of Divorce which adquired considerable publicity abroad owing to the extremely short time wich the law established for the dissolution of the bonds of matrimony, inasmuch as the petition of one of the spouse only, without hearing the other spouse, was sufficient for the Judge to immediately grant a decree of divorce.

The said Law was in effect about three years, during wich time many peoples took advantage of the benefits thereof, among whom were many americans and residents of the United States. In 1926 this Law was repealed in favor of a new Law, giving jurisdiction of cases of this nature to the Judicial Powers, but establishing for such persons whose marriage was consumated outside of the State of Yucatan the requirement of a six months residence prior to instituting within this State.

The former Law of Yucatan was severely attacked before the American Courts, principally because the so-called defendant seldom if ever had cognizance of the action nor was she or he provided with the opportunity of defense. It is well here mention that those cases are absolutely distinct from the cases now being taken into the Court of the State of Campeche, and mention of which is made hereinafter.

In 1926 the Legislature of the State of Campeche, which is the neighboring State to the westward of Yucatan, promulgated a Divorce Law which unlike the previous Yucatan Law provides for service or summons upon the defendant, and as this procedure is in accordance whith jurisprudence universally, the judgments rendered thereunder are legal and should be held as such. Those who have taken asylum under this Law, have encountered no complications of whatsoever nature and many of them, residents of the United States, have contracted new marriage within the United States itself.

Relative to the Campeche Law of Divorce there will be found hereinafter a brief Synopsis of the same for the information of such parties who might desire to engage my professional services on the matter. (Synopsis omitted.) . . .

Yucatan is accessible through Progreso, its port of entry. The latter can be reached out of New York and New Orleans. From New Orleans there are several steamers weekly and the traversy lasts three days. From New York there are weekly Ward Line steamers and the traversy lasts six days.

Should clients advise me of their departure, I will arrange to meet them upon arrival at Progreso, for the purpose of assisting through customs and providing for their confortable accomodation.

Very truly yours.
FRANCISCO ARCOVEDO GUILLERMO.

American Judicature Society Reorganizes

THE American Judicature Society has recently been reorganized to adapt it to more extensive operations, according to a communication received from Secretary Harley. It has elected to its board of directors one hundred lawyers representative of the progressive element of the Bar in all the states. Its first president is Mr. Charles E. Hughes and its five vice-presidents are: Moses H. Grossman, New York City; Chester I. Long, Wichita; Thomas W. Shelton, Norfolk; Judge Harry Hollzer, Los Angeles; and Walker B. Spencer, New Orleans. Chief Justice Harry Olson continues to hold the office of chairman of the board, while

Herbert Harley remains as secretary and editor of its Journal. Mr. Harley's communication continues:

"The Society has been concerned, since its creation in 1913, mainly with civil justice, but in respect to such fundamentals as court organization, bar integration, the selection and tenure of judges and the rule-making power, its work contributes equally to the promotion of the essentials of successful criminal law administration. An example of this is afforded by the creation in 1920 in Detroit of the first unified criminal court (possessing all criminal jurisdiction in that city), which made a phenomenal record in its early years, until control passed from the four great judges who gave it international prominence, due to the defeat of one of them for re-election. This shifted control to another element, and the first step in retrogression was immediately taken by making the office of Chief Justice rotate and change every month. So this court has the unique history of having proved both the success of proper organization and able control, and also the fatal weakness of mediocre control, even with good organization.

"Since 1917 the Society's activities have been expressed mainly in its bi-monthly Journal, the only publication devoted solely to reform in the administration of Justice, which is circulated free among all interested in the subject. It is apparent now that the large movement which has manifested itself in various ways will make rapid progress. Wherever a state bar association can develop sufficient integration to permit of self-government and can obtain from its legislature acts creating a judicial council and conferring the rule-making power on the judiciary, the needed foundation for extensive progress is possible. All this comes about through the bar itself, without the need of educating the lay public. The judicial council unifies the judiciary and forms a link between the state bar and the courts. The rule-making power, exercised under some form of co-operation between bench and bar, opens the way to all the betterments that may be derived from improved methods of practice and procedure. There has long been a feeling that the lay public would have to be educated and regimented to force these things on the judiciary. Recent history shows this theory to be a mistaken one. While in a nation having forty-eight distinct sovereign states, progress appears at first extremely difficult, the fact is that, with an informed bar, it is easier than was the case in the last century in England, which has long been proud of its great success.

"The American Judicature Society conceives its mission to be that of uniting progressive lawyers in all jurisdictions in order to aid state bar associations along the road to self-government and responsibility for the efficient administration of justice through organization of the judiciary and the power to regulate procedure by rules of court. It becomes more and more a sort of bureau of information as to current progress, which is seen to radiate from more progressive states to their neighbors. There is nowhere any organized opposition to the fundamentals of the movement, and inertia in many states is rapidly being displaced by enthusiasm. The Society boasts that it has no creed and no dogmas, but can accept in its membership every lawyer who conceives that he has a duty to his profession."

International Institute of Public Law

THE following account of a recent session at Paris of the "Institut International de Droit Public," which was participated in by men who are among the foremost scholars in public law in Europe, calls attention to the work of this organization and will doubtless prove of interest to many American lawyers and legal scholars:

A session of the Institut International de Droit Public was held at the Salle des Fêtes, of the Faculty of Law of the University of Paris, on October 20 to 22, 1928. The session began with an administrative meeting presided over by Professor Caston Jèze. At this business meeting, among other things, a project was approved for the publication of an "Annuaire de l'Institut." This publication is planned to present annually a report of all constitutional changes and important legislation on subjects of public law as well as the course of decision on administrative and constitutional questions, and political changes in all countries. It will contain an analytical table of contents, and is expected to make a unique and necessary working instrument for all who are interested in public law.

The following new Associate Members were elected: Messrs. Burckhardt, Professor at the University of Berne; Calderon, Professor at the University of Buenos Aires; Herrnritt, Professor at the University of Vienna; Pitamic, Professor at the University of Ljubljana; Scelle, Professor at the University of Dijon; Stain, Professor at the University of Sofia; Weyr, Professor at the University of Brno.

M. Rolland, Professor in the Faculty of Law

of Paris, Treasurer of the Institut, was elected a titular member.

In the afternoon of the same day, the first general meeting was opened under the presidency of Professor Jèze. It was decided to hold the next session in the last week of June, 1929, the exact date to be fixed by the Council of Direction. The program for this next meeting will involve discussion of the following reports:

(1) On law and rules of law (La règle de droit et le droit objectif).—M. Duguit, Reporter.

(2) On the theoretical and practical value of the principle of separation of powers, and its application in the public law of modern states.—M. Redlich, Reporter.

(3) The bearing of rules of constitutional law upon the conclusion and ratification of international treaties.—Reporters, Messrs. Politis and Schücking.

(4) The crisis of representative and parliamentary governments in modern democracies.—Reporters, Messrs. Barthélemy and A. Lawrence Lowell.

(5) The question of referendum and popular initiative.—Reporters, Messrs. Fleiner, Garner, Kelsen and Thoma.

(6) The political role of parliamentary committees.—Reporters, Messrs. Barthélemy, Kaufman, Merkl and Rolland.

On motion of M. Alvarez the meeting decided upon a critical examination of the declarations of the rights of man, and on motion of M. Jèze the different individual liberties will be studied, beginning with property. M. Gascon y Marin was designated as one of the reporters upon this commission, the other reporters and the members of this commission to be named later.

The president opened the discussion of the report of M. Kelsen upon the jurisdictional sanction of constitutional principles. The reporter made a brief resumé of his report, and MM. Barthélemy, Duguit, Gascon y Marin, Jèze, Kelsen and Thoma took part in the discussion.

The second general meeting was held on Monday, October 22, M. Fleiner presiding. It was devoted to discussion of the report of M. Jèze on the juridical significance of public liberties. M. Jèze had previously made a resumé of his report, which was discussed by Messrs. Berthélemy, Duguit, Gascon y Marin, Kelsen, Nolde, Politis and Thoma.

These two discussions will be set forth in special publications of the Institut. They were carried on in French and in German.

After the discussion M. Jèze resumed the chair. After thanking the foreign members and testifying to the interest in the scientific work of the Institut, he pronounced the meeting adjourned.

The meeting seems to have been truly international in character and to give promise of great scientific value in the work of the Institut.

Annual Meeting at Memphis to be October 23-25

The Executive Committee of the American Bar Association at its meeting at Miami on Jan. 15 and 16 fixed Oct. 23-25 as the date for the Annual Meeting to be held at Memphis. It decided that the Spring meeting of the Executive Committee would be held at Washington, D. C., on the Monday and Tuesday next preceding the regular annual meeting of the American Law Institute.

The Committee approved the finding of the Standing Committee on Professional Ethics forfeiting the membership of Carlos S. Hardy, Judge of the Superior Court of Los Angeles County, assigned to the Criminal Branch, for violation of Canon 29 of Professional Ethics and of Canons 13, 24 and 32 of the Canons of Judicial Ethics. The gravamen of the charge was that Judge Hardy received twenty-five hundred dollars from Angelus Temple Corporation, of which Aimee Semple McPherson was an officer and member, at a time when there was probability of her conduct being considered by the Grand Jury of the county.

The regular routine financial business of the Association was attended to. All the members of the Executive Committee were present except Mr. Silas H. Strawn.

AMERICAN BAR ASSOCIATION COMMITTEE ON COMMERCE

AGENDA FOR ANNUAL MEETING TO BE HELD IN THE BUILDING OF THE CHAMBER OF COMMERCE OF THE STATE OF NEW YORK

65 Liberty Street, New York City

Tuesday, Wednesday and Thursday

March 26, 27, and 28, 1929

Tuesday, March 26, 1929

10:30 A. M.:
1. Suggestions of
   (a) New business.
   (b) Other subjects.
2. United States Contract and Sales Bill.
3. Bill providing for the payment of interest on judgments rendered against the United States.
4. Uniform nomenclature for bonds.

2:00 P. M.:
5. Revision of calendar to provide for thirteen months instead of twelve.
6. A bill relating to bills of lading for carriage of goods by sea.
7. Admiralty jurisdiction on wharves.

Wednesday, March 27, 1929

10:00 A. M.:
1. Proposed amendments to the Federal anti-trust laws.

2:00 P. M.:
2. Proposed amendments to the Federal anti-trust laws.

Thursday, March 28, 1929

10:00 A. M.:
1. Amendments to Federal arbitration law.
2. Bill relating to settlement of industrial disputes.
3. Regulation of the sale and transportation of pistols in interstate commerce.

2:00 P. M.:
4. Bill relating to motor vehicles used in interstate commerce.
5. Instruments relating to interstate and foreign negotiable paper, fire insurance policies and warehouse receipts.
6. Executive session.

STATUS OF THE LIEN OF FEDERAL JUDGMENTS

Decision of Supreme Court of the United States in Rhea vs. Smith Raises Important Question for Legislatures in Many States—Analysis of Act of 1888—Powers of the States in the Premises—Exact Point Involved in Case Under Discussion—Comments On Opinion—New Federal Act Would Complicate Situation

By W. T. Stockton
Member of the Jacksonville, Fla., Bar

THE decision in Rhea v. Smith (Mo. 1927) 47 S. Ct. 698, 274, U. S. 434, 71 L. Ed. 1139, has caused a tremendous amount of study and discussion throughout the United States. The opinion in that case by Mr. Chief Justice Taft, held that Missouri had failed to conform to the Act of Congress of 1888 and that, therefore, the lien of a judgment rendered in the United States District Court of that state extended throughout its district.

Very naturally the national title insurance companies were particularly perturbed. The New York Title & Mortgage Company, through its solicitor, George S. Parsons, has published a pamphlet entitled "The Lien of Federal Court Judgments in the Various States of the Union." The conclusion of this pamphlet, rather astounding, is that there are twenty-three states in which the necessary legislation to secure conformity has not been adopted. Therefore, the question is undoubtedly of great national importance.

The question involved, to be understood, should be considered, not only in the light of its history, but also in the light of an analysis of the Act of Congress of 1888, which is at the basis of the matter, and in the light of an analysis of the Rhea v. Smith case itself.

In 1849 the United States Supreme Court, speaking through Mr. Justice McLean, handed down a decision in the case of Massingill v. Downs, (Miss. 1849) 7 How. 760, 768, 12 L. Ed. 903. This decision has been regarded as the fountain-head of the rule therein set forth as follows:

"In those states where the judgment on the execution of the state court creates a lien only within the county in which the judgment is entered, it has not been doubted that a similar proceeding in the Circuit Court of the United States would create a lien to the extent of its jurisdiction. This has been the practical construction of the power of the courts of the United States, whether the lien was held to be created by the issuing of process or by express statute. Any other construction would materially affect, and in some degree subvert, the judicial power of the Union. It would place suitors in the state courts in a much better condition than in the federal courts."

In this state of the law, Congress passed an Act on August 1, 1888, now to be found in U. S. Comp. St. 1916, Sec. 1606; 4 Fed. Stat. Ann. (2nd Ed.) 608; Ch. 729 25 Stat. L. 357; and in U. S. C. A., Tit. 28, Sec. 812. The Act itself originally contained three sections. Subsequently the third section was amended and afterwards repealed. Section 1 of the original Act remains in force and that is all with which we are concerned.

Briefly, Section 1 of this Act provides that federal judgments,—decrees also are to be included in this terminology,—shall be liens throughout a state in the same manner and to the same extent and under the same conditions only as if such judgments had been rendered by a court of general jurisdiction of that state. In other words, Congress did not give up its rights to fix the terms and conditions of a federal lien, but affirmatively enacted that liens of federal judgments should be in exactly the same category as the liens of judgments of state courts of general jurisdiction. It made no difference what a state should enact as to the lien of its own judgments, that same thing was to be true of federal judgments. The Act contained a proviso that this rule should not be applicable under certain conditions, and we will deal with that proviso later. The main rule is as stated and applies to every state, unless the proviso has not been complied with.

The first case in the federal courts to consider the question after the passage of this Act was Dartmouth Sav. Bk. v. Bates, (C. C. Kan. 1890) 44 Fed. 546. This case is frequently cited, and it is, therefore, important to know what this case held. Kansas had passed an Act which was obviously intended to comply with the proviso of the Act. The question arose whether it had done so. In deciding that it had, the Court stated as follows:

"The first clause of the Act places judgment liens in a federal court on the same footing in all respects as a judgment lien in a state court of general jurisdiction. But the power of Congress was *not adequate* to the task of extending the territorial operation of a judgment lien in the mode provided by state laws for a judgment in the state court. * * * Congress could not make it obligatory on the state Clerks to docket and enter a judgment of a federal court on their records. But it was entirely competent for the State to require her Clerks to perform this service, and the proviso in Section 1 of the Act declares, in legal effect, that when the laws of a state provide for docketing in her Clerks' offices, or other offices, the judgments of federal courts, in the same manner that judgments in her own courts may be docketed, then, and not before, the territorial extent (in other respects they were already the same) of the lien of a judgment in a federal court in that state shall be the same as that of a judgment in the state court."

The next case dealing with the question was Cooke v. Avery (Texas 1893) 13 S. Ct. 340, 147 U. S. 375, 37 L. Ed. 209. Mr. Chief Justice Fuller, after considering the general question, shed light upon its history as follows:

"There was no law of Congress, however, prior to August 1, 1888, which expressly gave a lien to the judgments of the courts of the United States or regulated the same, but on that day an Act was approved, which made such judgments liens on property throughout the state in which the federal courts sat, in the same manner and to the same extent and under the same conditions only as if rendered by the state courts."

Obviously a state has no power to provide a different rule. The only thing a state can do is to

legislate concerning the lien of its own judgments, and whatever rule it establishes will apply to federal judgments, provided only that if for its own judgments something more than the mere rendition of the judgment has to be done, then the same thing must be authorized to be done for the federal judgment.

One of the purposes of this paper is to assist in pointing the way to desirable legislation. To arrive at satisfactory conclusions, we must first analyze Rhea v. Smith and the Act of 1888. Let us take the Act first. We are concerned only with Section 1 as heretofore explained. That Section as set forth in 4 Fed. Stat. Ann. (2nd Ed.) 608, reads:

"That judgments and decrees rendered in a circuit or district court of the United States within any state, shall be liens on property throughout such state in the same manner and to the same extent and under the same conditions only as if such judgments and decrees had been rendered by a court of general jurisdiction of such state: *Provided*, That whenever the laws of any state require a judgment or decree of a state court to be registered, recorded, docketed, indexed, or any other thing to be done, in a particular manner, or in a certain office or county, or parish in the State of Louisiana before a lien shall attach, this Act shall be applicable therein whenever and only whenever the laws of such state shall authorize the judgments and decrees of the United States courts to be registered, recorded, docketed, indexed, or otherwise conformed to the rules and requirements relating to the judgments and decrees of the courts of the state."

The Act itself is very carefully drawn. First, it lays down the broad general rule that federal judgments shall be liens in the several states just as if they had been rendered by the courts of general jurisdiction of such states. In Missouri, for instance, the Circuit Courts are the courts of general jurisdiction. Thus the same rules which a particular state provides as to the liens of judgments of its courts of general jurisdiction are to be in effect for federal judgments.

But Congress could easily see that the different states frequently made rules for recording or doing something additional in order for the lien of state judgments to attach. Now Congress has no power to require any state to permit the recording or additional thing to be done for federal judgments. The power to permit such things is vested solely in the several states.

While Congress could not require a state to permit the recording or additional thing to be done for federal judgments, it could provide that unless express permission was given by a state, the general rule indicated by this Conformity Act of 1888 should not apply. This is exactly what was done.

After setting forth the general rule, Congress then provided that if any state required any recording or additional thing to be done then before the Act should apply that state should also expressly authorize for the federal judgments such recording or additional thing to be done.

Thus the Act resolves itself into two main parts: (1) the enactment of the general rule; (2) the condition necessary for application. The condition itself does not apply unless there is some state requirement for recording or additional thing to be done. If there is nothing of this kind, then the whole proviso is of no effect and the main rule will operate, but if there is a state requirement of recording or something additional to be done before the lien of a state judgment attaches, then the main rule is not to operate unless the state also expressly authorizes the recording of, or other additional thing to be done as to, the federal judgment.

The proviso does not necessarily require any state action whatsoever. If, for instance, a state provides that the lien of a judgment of its court of general jurisdiction upon rendition shall extend throughout the state and nothing more is required, then in that jurisdiction the lien of a federal judgment similarly extends throughout the state on rendition. In this illustration there is nothing more required by the state. Therefore, the proviso has no application and the main rule applies.

Examining the various publications of Section 1 of this Act of 1888, we find that it appears mostly in one sentence with a colon and "provided that" separating the main rule from the proviso. In the U. S. C. A. there is a period after the statement of the main rule. The proviso starts off without any "provided that." There is no other difference to be inferred therefrom except only that the meaning thus appears more clearly.

Let us now proceed to examine in detail the proviso of the Act. It will be noted that five different classes of things are contemplated as possibly being required by a state before the lien of its own judgments may attach, as follows: 1. Registering. 2. Recording. 3. Docketing. 4. Indexing. 5. "Or any other thing to be done."

Obviously, the intention is to cover all the known different kinds of state requirements with a general inclusion to cover any extra or new requirements. At any rate, if a state requires any of these five things to be done for its own judgments before a lien may attach, then the state must authorize the same one of these five things to be done for federal judgments. If it does, the Act applies; and if not, the Act does not apply. In other words, if a state requires that a state judgment, in order for a lien to attach, must be registered in a particular way, then that state must expressly authorize a federal judgment to be registered in the same way. If it does, the Act applies; and if it does not, the Act does not apply.

In many states, as in Florida, for instance, the lien of a judgment of a court of general jurisdiction attaches upon rendition throughout the county and the only requirement for the lien to be extended throughout the balance of the state is that a certified copy of the judgment must be recorded in a particular book in the other counties. Therefore, if a state should expressly authorize a certified copy of a federal judgment to be recorded in the same book in every other county of the state, the Act would apply. Then a federal judgment would be a lien outside the county where rendered only if recorded as authorized.

If a state does not require that its own judgment be registered, recorded, docketed or indexed, but does require any other thing to be done, then that state must expressly authorize the same thing to be done for federal judgments so as to provide conformity to the rules and requirements relating to the judgments and decrees of the courts of that state. In some states there is nothing else required but recording. We are not, therefore, concerned in those states with this fifth category of extra things. And similarly we are not concerned with this last

category if the only other thing required is registering, docketing or indexing.

The Act of 1888 is in its policy most cordial and generous. It lays down the rule that the lien of a federal judgment in a particular state is to be exactly the same as the lien of a judgment of a court of general jurisdiction of that state. The only condition attached to this rule is that whatever extra machinery a state requires to effect the lien of state judgments shall also be authorized for and placed at the disposal of the federal judgments. Now, a state may fail to provide that its own machinery be placed at the disposal of federal judgments. If it so fails, the Act does not apply, but a state has no power to make any rules whatsoever for the lien of federal judgments except indirectly by laying down the rules for its own judgments. The state never had any such power before the Act of 1888, nor has it had any such power since that Act.

If a state should attempt to pass any law to discriminate against a federal judgment, the law would have no effect. It would be contrary to the fundamental law. The national government alone has the right to settle the rules for the federal courts and the lien of its judgments. The state may not in any way change those rules, except in so far as the change is expressly permitted by an Act of Congress. But the Act of 1888 does not authorize a state to make any rules for the lien of a federal judgment different from the rules it makes for the lien of a judgment of its own courts of general jurisdiction. In fact, that Act does not authorize a state to make any rules at all for the lien of a federal judgment except only that under certain specified conditions the same rules made by a state for the lien of a judgment of its own courts of general jurisdiction shall likewise apply to federal judgments. Thus indirectly, and only so, can a state affect the rules concerning the lien of a federal judgment. If a state passes a law which in terms attempts to discriminate against a federal judgment, it is without any authority of Congress, and, therefore, will not be enforced. It would be futile and the attempt of no avail. The excessive authority assumed would be declared of no effect. It would be unconstitutional and void *ab initio*.

The Act of 1888 is not concerned with the motives of states or even with their attempt to do an unwarranted thing. No state legislature can discriminate against a federal judgment and its lien. Federal courts under the Constitution are the creatures of Congress, not of the states. The Act of Congress ignores all attempts at discrimination. They merely fall by the wayside. It is concerned, however, with having equal machinery so that a federal judgment can be in the same category with judgments of courts of general jurisdiction. That done, the Act of Congress is satisfied, and the main rule prevails.

The United States Constitution, Art. III, Sec. 1, provides for a Supreme Court and such inferior courts as Congress may establish, while Art. I, Sec. 8, gives Congress power to pass all necessary laws for carrying into execution all powers vested in the United States. The Judiciary Acts of 1789 provided for the rules and processes in federal courts. The Process Act of 1828 further defined matters. Thus federal courts, their rules and processes, even to the territorial lien of its judgments, are governed by the Constitution of the United States and the Acts of Congress passed in pursuance thereof. This is clearly established by Wayman v. Southard, 10 Wheat. 1, 6 L. Ed. 253, in which Mr. Chief Justice Marshall, considering these matters, held that there was no doubt whatever but that Congress had full power to carry into execution all the judgments of the federal courts. If this is so, state legislation on the subject must be unconstitutional.

Our analysis of the Act of 1888 may then be summarized as follows: That the Act sets forth a main rule; that this rule is that federal judgments shall have the same lien as the state provides for its judgments of courts of general jurisdiction, whatever that may be; and that the Act is applicable without further ado unless a state requires something more to be done for the lien of a state judgment to attach, and that if something more is thus required to be done, then the state must also provide that the same thing shall be authorized for federal judgments, and that if under these circumstances the state does provide the same thing, the Act applies and the main rule is in effect.

We are now ready to examine the Rhea v. Smith case. The exact point involved was whether a federal judgment was, upon its rendition, a lien in the county where rendered without further action. Three sections of the Missouri statutes were involved. Sections 1555 and 1556 (Mo. Rev. Stat. 1919) provided that judgments rendered by any court of record should on the day of rendition become liens throughout the county where rendered. Section 1554 provided that federal judgments and judgments of certain high state courts should be liens upon filing transcript with the Clerk of the Circuit Court. No transcript of the federal judgment involved in this case had been filed. The decision was that, nevertheless, the federal judgment was a lien. What was the reasoning of the opinion?

In the first place, it held that in Missouri the conformity required should obtain with respect to the circuit courts and not with respect to the high state courts. Therefore, we shall hereafter refer to the circuit courts in place of using the longer phrase of "courts of general jurisdiction."

The opinion, after a statement of the facts and a few references, cites Massingill v. Downs, supra. We have already seen that this case is recognized as the fountain-head for the rule that the lien of a federal judgment extends throughout its district. As heretofore pointed out, this rule continued until the Act of 1888. The opinion then sets forth that Act in full.

Next, the opinion proceeds to set forth the three sections of the Missouri statutes. It then proceeds to state that Congress intended to change the other rule, but

> "Only in those states which passed laws making the conditions of creation, scope, and territorial application of the liens of federal court judgments the same as state court judgments."

This is practically true, but a rather dangerous statement of the effect of the statute. Full force must be given to the word "conditions," or otherwise the meaning will be entirely lost. In other words, if a state makes the conditions the same, the Act shall be effective. It does not mean that a state must pass laws making the creation, scope

and territorial application of liens of federal judgments the same as of state judgments. The meaning is merely that the conditions of these things must be the same. Thus, all the state can do is either to make the conditions the same or fail to do so. Failure in making the conditions the same will result in the Act not operating, while making the conditions the same will result in the Act applying. State action attempting to put an additional burden upon federal judgments not put upon its own judgments is merely ineffective and of no avail. All this is necessary to be pointed out, because many in reading the decision have failed to grasp the full force of the word "conditions."

The opinion, after stating the rule just quoted, which carries the germ of the decision, proceeds to apply it to the Missouri statutes. It continues that if effect is given to those statutes, a federal judgment cannot be a lien in the county where rendered unless a transcript is filed. Does not this pronouncement quite overlook the rule of decision of Metcalf v. Watertown, 153 U. S. 671, 14 S. Ct. 947, 38 L. Ed. 861? In that case Mr. Chief Justice Fuller had before him the statutes of limitation of Wisconsin. The words of those statutes appeared to say that ten years was the bar "upon a judgment * * * of any court of the United States," while it was twenty years "Upon a judgment * * * of any court of record of this state." Note that the language "any court of record" is the same both in this Wisconsin case and in this Missouri case under discussion. Pertinent sentences from the opinion of Mr. Chief Justice Fuller are as follows:

"We are not obliged to take those words literally, but they are open to construction."

And again:

"The true rule for construction of statutes is, to look to the whole and every part of the statute, and the apparent intention derived from the whole, to the subject matter, to the effects and consequences, and to the reason and spirit of the law; and thus, to ascertain the true meaning of the legislature, though the meaning so ascertained may sometimes conflict with the literal sense of the words."

By application of these rules the conclusion was reached that "any court of record of this state" included United States courts held within the state, and the twenty-year rule applied. The ten-year rule in so far as it applied to United States judgments was held to refer only to such judgments as were entered in United States courts held outside of Wisconsin. The opinion held that the Supreme Court could not attribute to Wisconsin any desire to discriminate against United States judgments.

If this rule of interpretation had been applied, Section 1555 of the Missouri statutes would have been construed to include United States judgments, especially as the Supreme Court ought not to imply any desire to discriminate. This reasoning may not be applicable, but it appears to be very much in point.

The opinion in Rhea v. Smith next deals with the decision of the Supreme Court of Missouri, from which certiorari had been taken. The Missouri court had taken the position that the difference between the requirements for federal judgments and for circuit court judgments was so slight that there was no discrimination. This very properly was answered by saying that the conformity required should obtain as between the federal court and the circuit court, and not as between the federal court and the state appellate courts. The word "conformity" is again used, but again passed over without any definition. Approximate conformity is held insufficient and this is illustrated. The reasoning is beyond dispute.

Then ensues a discussion of Jackson Light & Traction Company, 269 Fed. 223, to the effect that in Mississippi conformity existed. So far as the opinion shows, there is no doubt about it. Examination of the cited case shows that as to both judgments of state and federal courts enrollment is required, but that a state judgment when enrolled becomes a lien dating back to rendition—by words of the Mississippi statutes—but so far as those words go, federal judgments do not date back. Now, either a federal judgment upon enrollment, in spite of the apparent favor to the state judgments, becomes a lien from rendition or the Act is not in conformity. It may be safely concluded that the opinion in Rhea v. Smith approves the cited decision. We may, therefore, conclude that a federal judgment in Mississippi upon its enrollment similarly becomes a lien dating back to its rendition. The opinion does not expressly hold this, but if the state has conformed, the main rule of the Act is bound to apply, namely, that the lien of the federal judgment shall be the same as that of the state judgment, and this rule, therefore, in Mississippi requires a relation back. What the Mississippi case actually decided was that, enrollment within twenty days of all judgments being required, and the federal judgment involved not having been enrolled within that time, the judgment was not a lien at all.

Again discussing the Missouri opinion with regard to the arguments based upon the repeal of the additional section of the Act of 1888, the Supreme Court disposes of those arguments and continues:

"It is the inequality which permits the lien instantly to attach to the rendition of the judgment without more in the state court which does not so attach in the federal court in that same county that prevents compliance."

For the reasons stated hereinabove, the quoted section seems not to be entirely supported by the Act. The only thing which can prevent compliance is the failure of a state to permit the same thing to be done for a federal judgment as is required to be done for a state judgment before the lien attaches. The state cannot and never did have, either before or after the Act of 1888, the power to do anything to prevent the lien of a federal court judgment from attaching in the county where rendered if nothing more was required for a state judgment for its lien to attach in the county where rendered. Before 1888 the lien attached on rendition, not only in its home county, but throughout the district. After 1888 this rule continued unless the Act of that year applies. Now, if the Act applies, the lien of the federal judgment is to the same extent and under the same conditions only as the lien of the state judgment. Therefore, if the state judgment requires nothing more to be done for a lien to attach in the county where rendered, so nothing more needs to be done for a federal judgment lien to attach.

The opinion in Rhea v. Smith concludes that as the Missouri statutes do not secure the needed conformity the lien of a federal judgment in Missouri attaches throughout the district. This appears

to overstate the requirements of the case. The only actual question before the court was whether the federal judgment was a lien in the county where rendered without any transcript being filed in that county with the Clerk of the Circuit Court. The irreducible minimum of the decision is merely that the federal judgment in question was a lien in its home county without further recording. The case may properly be quoted as authority for that conclusion and for no more. The rest is *obiter dicta*.

We are informed that the decision of Rhea v. Smith has led many to seek an amendment of the Act of Congress of 1888. The matter has even gone so far as to have the attention of Senator G. W. Norris, Chairman of the Judiciary Committee of the United States Senate. However, it is difficult to see what good could be thus accomplished. Any new Act or amendment must necessarily face the same necessity for some state action just as the Act of 1888 did, and if so, must similarly carry a proviso just as the former Act. This being the case, the situation would not be improved but rather further complicated. Many states have already complied with the Act of 1888, and in these states, as well as the others, further state action might then become necessary.

Certainly it appears that it would be better for the non-complying states to proceed with the necessary legislation under the existing Act, since it is easier so to do once this Act is understood, than for the whole situation to be complicated with another Act of Congress.

BAR AND LAW SCHOOL UNITE FOR RESEARCH IN WEST VIRGINIA

By Thurman W. Arnold
Dean of Law School of West Virginia University

NO professional schools in America are taking themselves quite so seriously as the law schools. In very few departments of any university can you find such a bubbling, effervescent attempt to be forward-looking and to progress somewhere as you will find in the colleges of law. The law as a social science is beginning to arise and stretch itself and proclaim its merit. This has naturally had its beginning in that particular class of law schools which aspire to be national institutions, such as Yale, Harvard and Michigan. President Angell in his address before the Association of American Law Schools last year, which is published in the April issue of the American Bar Association Journal, put the idea in this way: "I am disposed to assume that so far as the law school is merely a trade school, teaching the sheer mechanics of a profession, it has no place in a university, conceived with any regard to the scientific values inherent in the true university. A trade school is a wholly reputable affair and many such are doing excellent work of a great social and practical value. They do not belong in a university for the simple reason that the basic ideals of the two are at variance."

It has been frequently pointed out that one of the handicaps in the development of modern legal philosophy has been the breach between the bar and the presumably more scholarly element of the profession, the law teacher. Chairs of research and elaborately annotated critical articles in law magazines have been the only method by which the results of work in law schools have become known. That these have had some effect is unquestionable. But this effect has been not as marked as it should be, due partly to the lack of cooperation and understanding between bar associations and law schools.

Bar associations, like all institutions for human betterment, have been very much concerned about finding projects upon which they can utilize their energy. But until the America Law Institute we know of no project which fused the critical and philosophic attitude of the law teacher to the practical and conservative point of view of the lawyer in reshaping the law. And there is reason to believe that much of the success of the American Law Institute has been due to the fact that in that undertaking the scholar and the practitioner have at last found the idea to work together.

But the scope of the American Law Institute is national. It does not and cannot concern state problems. Such local problems and the legal aspects of local industrial problems have lacked scientific treatment in most states. In the limited time possible for bar association meeting they have been discussed. Such discussions however have not been fruitful because the work of the committee who present the problems is too frequently clouded by the ready flow of language of members of the bar who have very decided opinions which are not the result of scientific investigation. The committee too often finds its report sunk without a trace under the weight of amended resolutions.

It is entirely possible for a state law school to take a position of leadership in the development of state problems which lie peculiarly within its field. It requires two things. First, an active and interested bar association. Second, a law school which has more than the ideals of a trade school. Both of these exist in West Virginia. Further than that there is only one law school in West Virginia and the much mooted problem of the proper place and recognition of non-association night schools and commercial law schools, does not exist. In addition to all that, the Bar Association in West Virginia is actively interested in the law school and its committees on legal education are far more than nominally functioning bodies of this character which are so often in evidence.

The West Virginia Bar Association, in conjunction with the College of Law of West Virginia University, has started a plan of joint research

work on state legal problems which has the advantage of joining the active political force of the Association and the more scholarly work of the law faculty. It aims to utilize the services of the faculty of the law school in much the same way as the work of the reporters of the American Law Institute is utilized by the American Bar Association. The work of the faculty done on the problems which are selected will be presented to the State Bar Association each year at its annual meeting, where it will be discussed and either approved or modified. Such remedial legislation as may be indicated by this work will be urged by the Bar Association before the Legislature. The results of such work which do not indicate any particular legislation, will be distributed as widely as possible among members of the Bar Association.

The machinery of the plan is as follows: (1) The particular legal problems on which research will be done by the law faculty are to be approved by the Executive Council of the Bar Association. The purpose of securing this approval is to maintain a connection between the bar association and the law school to the end that the practical experience of the Association in determining the most important problems to be studied may be available to the law faculty. It is also felt that there would be an increased interest in the members of the Association if problems in which they felt a particular importance are being studied and reported for recommendation by the Association.

(2) Selected members of the law faculty will devote their time in the summer to a study of these problems for which they will be paid additional compensation. In this way it will be possible to compete with the law summer schools for the services of the faculty. Whatever the merits of law summer schools may or may not be, it is certainly true that they have exercised a depressing effect upon legal scholarship in America. The temptation to earn extra money in the summer is usually greater than the urge to do scholarly work. Certainly there is no reason why research work in the summer time should not be compensated at least on equal basis with summer school teaching. The work can be carried on in the school year by cutting down the teaching load of those members of the faculty who are engaged in the study of particular problems. The first work which has been undertaken under this plan is the annotation of a restatement of laws published by the American Law Institute, so that it would be available for citation by West Virginia lawyers before West Virginia courts. Next summer the state Bar Association has requested, by a resolution at its last meeting, that the faculty study and made recommendations looking toward a revision of the rules of pleading and practice in West Virginia. Other proposed fields of research of importance to West Virginia, which may be taken up under this plan, are as follows:

(a) Coal rates in the Lake Cargo Rate Case.

(b) Work on legislation regulating the available water power in West Virginia.

(c) Research work on taxation in the state of West Virginia.

Still other questions on which study is contemplated are, investigation of the public utilities laws of West Virginia; investigation of the law of oil and gas, and investigation of whether the present available legal remedies are sufficient in the conduct of cooperative marketing associations among farmers of West Virginia.

(3) So far as possible this work will be carried on by the faculty in the summer at other law schools where specialists in particular subjects studied may be consulted.

It is hoped that such work carried on by the law school will have a double purpose, first, in its possible influence on the legal, economic and industrial development of the state, and second, the stimulating effect it will have on the faculty in keeping them abreast of practical legal problems. There will also be opportunity for students of high quality to do work on these problems, and it is hoped that this will create an atmosphere at the law school not unlike the atmosphere in a law office where work on particular legal problems is being done. Its tendency should be to break the entirely theoretical train of thought which comes from a too close application to general principles and theory on the part of students.

Whether this plan of making the College of Law of West Virginia University a sort of a clearing house for the legal ideas of the Bar Association will succeed or not will depend largely upon the quality of the work which the Law School is able to turn out. A bar association, from the nature of things, cannot be expected to give these problems any detailed study. Their functions will be rather the critical examination of the results and the united backing of such recommendations as may arise out of this study. It may, however, be said at this time that the work commences with the enthusiastic support of the State Bar Association and that it should supply much material for discussion at the next meeting. It is hoped that it will give the Bar Association carefully worked out reports for their consideration on legal problems and the legal aspects of industrial problems in West Virginia which would be impossible without the cooperation of the law faculty. From the point of view of the law faculty it is hoped that the faculty will be stimulated by the hope that the results of their work may have some practical effect on the courts and legislature, and that their research, instead of being buried in the pages of some law review, will have an appreciative and interested audience.

The College of Law in West Virginia is in an unusually fortunate situation to assume the kind of leadership indicated by this plan because it is the only law school in the state and because the bar association is much more actively interested in legal and industrial problems than most state associations. This plan which has received the approval of the association at its last meeting offers an opportunity to the law school to assume a leadership in the development of legal ideas which all law schools in theory should have but which in fact they do not possess.

JACOB McGAVOCK DICKINSON: 1851-1928

By Blewett Lee
Member of the New York Bar

JACOB McGAVOCK DICKINSON was born in the pretty town of Columbus, Mississippi, January 30, 1851. The law was in his blood, for his Grandfather, Felix Grundy, had been a great advocate and political leader in his time, and right-hand man to Andrew Jackson, while his Father, Henry Dickinson, a man of great charm, had been Chancellor in Mississippi, when the office carried much distinction, and had been Commissioner of the Confederate Government to the State of Delaware (and lucky to get safely back home too). The boy was a Confederate soldier before he was fifteen. Fortunately for him the curtain was rung down on the "nation lost," before he saw much fighting. His family then moved to Nashville, Tennessee, the home of his Mother's family, and at the local University there he graduated in 1871, taking his Master's degree a year later. He pursued his law studies at Columbia College in New York City.

JACOB McGAVOCK DICKINSON

It is not generally known that Judge Dickinson took a look at the Harvard Law School before making a choice of Columbia. At that time the case method of teaching at Harvard was still on trial. There is a tradition that when a law student at Columbia, he had a grand piano put in his room, but he found the law too jealous a mistress.

When a young man, the Judge must have been something of a Spartan. I remember once showing him a French art medal which I had bought. He examined it with much interest, and among other things inquired the cost, which was about $10. "I do not think," he said, "that I ever spent as much as that for a trifle just for my own pleasure." Something he could share with other people was different.

At Columbia Law School he acquitted himself so handsomely that one of his aunts in enthusiasm over his success wrote him, offering to lend him the money to pay his expenses if he wished to study in Europe. Knowing that the dear lady might change her mind, he sailed immediately, telegraphing her from the ship that he was on his way. This was the beginning of three years of liberal study abroad, principally at the University of Leipzig and at the Sorbonne and the School of Law at Paris. In his vacations he travelled much on foot. Indeed as he told me, he never put his foot in a carriage during his whole student life. Some of the attachments he formed were very lasting, and only a few years before his death I surprised him sending financial aid to the daughter of one of his student friends.

Admitted to the Bar at Nashville in 1874, only two years later he married Martha Overton, a woman of lovely character and great good sense. Overton is a well-known name to Tennessee lawyers, and the hospitality of her Father's home "Travelers' Rest" was famous. Horace Gray used to say of promising young lawyers of his time, "They go out West, and the railroads get them." At any rate they got Judge Dickinson, for he became early connected with the law department of the Louisville and Nashville Railroad, and rose to the rank of General Attorney in their service. For more than thirty years Nashville was his home. From time to time by special appointment he served upon the Supreme Court of Tennessee. He served actively the Democratic party, but could not always stand with them on financial questions. As a lawyer, he was recognized as one of the best of the exceptionally able Bar, gathered at the capital of the State.

At one time he might very well have been appointed on the lower Federal Bench, but when he found that Judge Lurton wanted the place, Dickinson generously withdrew, and Lurton's career thus begun ended finally on the Supreme Bench. Dickinson recognized early the gifts of Justices McReynolds and Sanford, and recommended them for their first official positions under the United States. Many a man less distinguished has been his debtor

for preferment. His friendship was a great asset, and his affection a noble gift. He entertained royally, and his house was the center of a charmed circle.

During President Cleveland's second administration, as Assistant Attorney General, Judge Dickinson argued many important cases for the Government. In 1899, he came to Chicago to become the head of the law department of the Illinois Central Railroad Company, a position he retained until he became Secretary of War. In 1903 under appointment of President Roosevelt he appeared for the United States before the Alaskan Boundary Commission, with successful results. Mr. Roosevelt had met Judge Dickinson hunting bear in Mississippi cane brakes, but although the President found the bear elusive, it was easy afterwards for him to locate a lawyer. When preparing this great case, Judge Dickinson for months isolated himself at his house, putting aside all other business. It is in this case that his foreign training was of the greatest service.

When Judge Taft became President, he appointed Dickinson Secretary of War. The warm friendship which sprang up between the two men in the days when they met as Judge and barrister, led to this appointment. The position of Secretary of War he filled two years only, as on account of financial reverses to a corporation in which the fortunes of his family were greatly involved, he was compelled to resign and devote himself to the work of financial rescue. In 1913, however, he served the Government as Special Assistant Attorney General in the proceedings against the United States Steel Corporation, and again in 1922 in a similar capacity he handled the injunction proceedings in the railroad federated shop crafts cases. He also served with great success, as Receiver of the Rock Island System from 1915 to 1917. One of his greatest causes was the Illinois Central Charter Tax Case in which he was engaged during its earlier years, before he entered President Taft's Cabinet and left the case in the capable hands of Walter S. Horton.

Judge Dickinson was always a strong supporter of the American Bar Association, and in 1907 became its President. In 1905 at Detroit, just as the excursion steamer, containing members of the Association, was being docked, venerable James F. Joy, distinguished lawyer of an older generation, fell into the water between the vessel and the dock, and was in great danger of being crushed or drowned. Just as he was, Dickinson plunged into the water, and rescued Joy, holding him until help came. He saw what to do, and acted instantly. Ten years afterwards a gold medal for life saving was given him for this gallant deed. It was really not the only time that he had saved life at the peril of his own. Perhaps this watery experience encouraged him when, as Secretary of War, while crossing the Pacific, on a wager he plunged into the ship's swimming pool fully dressed, to be followed by General Edwards and another officer, who must have thought their chief not only hell for leather but hell for uniforms.

To the last he was a keen sportsman who refreshed and renewed himself with hunting and fishing, disappearing from time to time for a few days, to return looking like a boy again. Overflowing as he was with energy and spirits, it was only in the last years of his life, and particularly after the death of his wife in 1917, after forty years of congenial companionship, that his friends could notice a slowing down. A year before he died, I sent him a new German historical novel. He replied, "Is this a joke? I have stopped trying to improve myself." But I doubt if he ever did.

One of his last honors was to be made President of the Izaak Walton League of America. The cause of saving the wild life of America was given his constant and diligent aid.

In spite of great efforts to enter the army in any capacity, perhaps on account of his age, his services were not accepted during the Great War, and he had to content himself with seeing both his remaining sons in the service, and in spending almost his whole time in patriotic activities. He was always busy helping other people.

When, on December 13, the news of Judge Dickinson's death was flashed over the country, many a heart felt a peculiar pang. A very competent critic, himself a distinguished lawyer, once said to me, "I have known some lawyers who could do some things better than Judge Dickinson, but he is the best all-round man I ever saw." And this truly was a description of the kind of lawyer he was,—a general practitioner in the sense that he made all law his province, and accomplished with excellence any kind of work that was given him to do. He was a man who would have succeeded well in any calling, strong, vigorous, versatile, shrewd, full of energy, and with a delightful social gift which endeared him to all.

Judge Dickinson represented the best type which the old South produced. He even had the familiar trait of always wanting more land. He was a man of distinguished manner and commanding physique. His mind was stored with all sorts of interesting things, and it was perfectly natural in a crowd of people for everybody else to stop talking and listen to him, or just draw him out.

A marked characteristic was a keen sense of humor. His fund of anecdote and reminiscence was inexhaustible. He had a great lot of good stories, and like Mr. Lincoln's they were frequently of great service. More than one of his tales lightened the labors of the Alaska Boundary Commission, and one of his stories brought into harmony the conflicting interests which were battling over the Rock Island Receivership.

The Judge had a great admiration for his fellow Tennessean Andrew Jackson. In the Dickinson library were many interesting materials in regard to the life of the great frontiersman, and one of the treats the Judge used to give his friends was to read stirring passages from the speeches and letters of "Old Hickory." Whatever may be thought of Jackson's judgment on some public matters, his rugged virtues and aggressive patriotism were sure to appeal to a man who had the same sterling qualities, however graced with the culture of European capitals. But above all others his prince of men was General Lee. A beautiful portrait of the great commander hung in the Judge's house in the place of honor, and the last thing he ever wrote was a short monograph on Robert E. Lee.

Judge Dickinson could have filled any position. If he had been an eagle, he would have given battle to the storm; if he had been only a blind mole, he would have died without flinching. How we would have liked to have seen him on the Supreme Bench

with his friends, Lurton and McReynolds and Sanford, and first of that noble brotherhood, his old chieftain, Taft. But where he really belonged was at the Table Round, with Arthur, the stainless King, and Launcelot. He was only lent to us. Tintagel has called him home again. He has gone not to peace and rest, but in immortal youth, to nobler labors and to finer service!

CODE OF CRIMINAL PROCEDURE: THE PROBLEM OF BAIL

First and Fundamental Question Is Whether Courts Should Be Allowed Discretion and, if so, to What Extent—Financial Responsibility of Sureties—Proposed Code Provisions on Subject—Amount of Bail—Provision Dealing with Peddling Applications to Successive Judges, etc.

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"BAIL is the security required and given for the release of a person who is in the custody of the law, that he will appear in any court in which his appearance may be required and that he will do, or refrain from doing, such other things as are stipulated in the bail bond or recognizance, hereinafter called the undertaking." So section 61 of the proposed Code defines a subject exceedingly troublesome in the administration of the criminal law.

The fundamental purpose of bail is what the definition states. Coke, in the Institutes, put it that "this word *ballium* is truly fetched from the French nown *bail*, that signifieth a guardian, keeper, or gaoler: and herewith agreeth Bracton. . . . There bailment is called a living prison." And Highmore, writing in 1791, says, "It is to be remarked, that Bail is the means of giving liberty to a prisoner, and at the same time securing the extent of the law to punish an offender."[1]

In some instances the conventional formalities of release on bail have been made use of for other purposes. Thus in cases of arrest for simple violations of the traffic laws, when the accused has been released on deposit of cash as bail, it has been tacitly understood by all parties, or even expressly stated, that the accused's non-appearance for trial shall operate as a forfeiture of the amount deposited, but that no further proceedings against him will thereafter be taken. In such cases, the amount of the deposit required is fixed at somewhat less than what the monetary penalty would be in case of trial and conviction, and the whole proceeding is considered as a simple and expeditious method of collecting fines on confessions of guilt. Whatever be the logical objections to the proceeding, it accomplishes a desired end with considerable satisfaction.[2] But it is not a "bail" proceeding in the conventional sense; since its purpose is not really to secure the presence of the accused but rather to give him an option of appearing or paying.

The Code therefore accepts "bail" in its older and established sense of a means of keeping an accused person within the control of the court without confining him in jail. Its subsequent sections seek to formulate the ways and means which are most practical from all points of view of accomplishing this purpose.

It is conventionally assumed, with apparently no controversy, that some system of release on bail while awaiting trial is socially desirable.

Release on bail is socially disadvantageous, however, to the extent that it results in failure of the accused person to appear at the time set for trial. It is objectionable also in its tendency to cause delay in the bringing of cases to trial. The efficacy of threatened punishment varies with the probability of its infliction and with the promptness with which it is imposed. Delay affects the probability of any punishment, as well as the time interval. Delay, therefore, is socially harmful. Undeniably the tendency to delay is increased, the pressure for prompt disposal of the case is lessened, by the fact that the accused is not actually in jail.[3] Moreover, if the bail fails of its purpose in keeping the accused under the court's control, if he fails to appear when called, there may be a complete failure of justice. Even payment by the surety of the amount of the bail is not a penalty imposed on a criminal.

Hence, if release on bail is to be permitted at all —about which there is no controversy—it should be done under the maximum of practical safeguard against abuse. It should not be granted at all if unlikely to restrain the accused. And when granted, the bail should be such as will most likely serve the purpose. But, on the other hand, the practicable availability to any accused person of release on bail should not be unreasonably restricted.

The objective of the draftsmen of the Code was

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1. A Digest of the Doctrine of Bail. By A. Highmore, p. VI.

2. See "Traffic Violations and the Court," 106 Ann. Am. Acad. of Pol. Sci. 185.

3. "The worst feature of the bail situation is not that in a few serious cases the defendant jumps bail and his surety is not compelled to pay. Considerably more demoralizing in its effect is the use of bail to secure the defendant's liberty while his lawyer attempts to wear out the State's case by delay. Jail cases are quite properly tried first, so that a defendant on bail starts off with an opening wedge of delay." Criminal Justice in Cleveland, p. 318. See also Bull. of the Clev. Assn. for Crim. Justice, March, 1926.

therefore to minimize the possibility of abuse without improperly restricting availability to every one.[4]

Judicial Discretion

The first and fundamental problem is whether courts should be allowed any discretion in respect to release on bail and, if any, of what nature and to what extent.

What discretion judges had at common law does not clearly appear. So early as Edward I a statute forbade judges to release on bail persons charged with certain offenses.[5]

On the other hand, the latter part of this statute, the Habeas Corpus Act[6] and possibly the common law seem to have deprived the courts of any power of discretion to refuse release in case of bailable offenses.[7]

However, under the present English law, courts have practically complete discretionary power as to whether or not they will release an offender on bail.[8] "In exercising their discretion with regard to bail the justices have to consider the nature of the offense, the strength of the evidence, the character or behavior of the accused, and the seriousness of the punishment which may be awarded if the accused is found guilty."[9]

In this country the matter of judicial discretion in respect to releasing on bail is covered by constitutional provision in all but a few states.[10] These provisions are affirmative of the right to bail, rather than restrictive of it, and in general provide that accused persons *must* be released on bail in any and every case, unless the offense charged is treason, murder, or other capital offense. Even in such excepted cases the courts can not refuse to release unless tne proof of guilt is evident or the presumption great.

In those states not having such constitutional provisions, a varying amount of discretion is left with the courts. Thus, in New York release on bail is a matter of discretion in all but cases of misdemeanor before conviction.

The framers of the Code had excellent precedent, therefore, for either policy. In England and such states as New York, Maryland and Georgia the judges have a large measure of discretion. In other states they have no discretion. Which policy of the law is the better?

"A man was arrested in Detroit on the charge of picking pockets; he secured release on bail and while the first case was pending he was arrested four additional times for picking pockets and secured bail each time."[11] There have been other equally scandalous instances of continued release of men whose freedom was obviously dangerous to the public.[12] But under laws, such as that of Michigan, *compelling* judges to release, regardless of the circumstances, the courts could not refuse. They can not even protect the public by making the amount of bail required so high as to be prohibitive. The law prohibits setting the amount at more than enough reasonably to assure the presence of the accused. If an accused shows no sign of "jumping" previous bail there is no legal excuse for raising the amount. The court must release him a third or a fourth time.

On the other hand, no particular evil appears to have developed in those jurisdictions where courts are permitted to refuse release when circumstances warrant refusal.

The Code is drawn therefore to permit judges a reasonable extent of discretion.

Section 66 prohibits release of anyone charged with a capital offense if the proof is evident or the presumption great. This is simply the accepted rule, though there are differences of phrasing in the various states. "Capital offense," for instance, might properly be changed to "treason or murder" in states where capital punishment does not exist. A notation in the Code itself calls attention to the propriety of certain changes. Where the proof is not evident or the presumption not great the accused "may" be released on bail in the discretion of a judge of the court having jurisdiction of the offense.

As to offenses less than capital, section 70 reads:

"Any person in custody for the commission of an offense not capital[13] shall, before conviction, be entitled as of right to be admitted to bail, except:

"(a) When he is in custody for the commission of murder, treason, arson, robbery, burglary, rape, kidnapping, or any offense against the person likely to result in death committed under such circumstances that if death should result the offense would be murder.

"(b) When he has been previously convicted of any of the offenses enumerated in clause (a), and such conviction has not been reversed.

"(c) When he was, at the time he was taken into custody, at large on bail charged with any of the offenses enumerated in clause (a).

"(d) When he has been previously released on bail for any of the offenses enumerated in clause (a), and there has been a breach of the undertaking.

"In all cases excepted under this section admission to bail shall be a matter of discretion."[14]

It will be observed that even this investiture of the judges with discretion to release on bail in certain cases would not prevent the Detroit situation referred to above, because pocket-picking is not mentioned as one of the crimes excepted from the general rule that release on bail is a matter of right. It would, however, enable the courts to avoid a similar situation in case of any of the crimes mentioned in the exception. The pick-pocket situation would, however, be *partly* rem-

4. The draftsmen have sought also, of course, to reduce so far as practicable the *necessity* for bail. The speeding up of procedure so that trial follows hard upon arrest, and release on bail is uncalled for, is a matter of administration, not of law; the Code could do little in this respect. It does, however, provide for "summons" instead of "arrest" in certain circumstances thus eliminating the need for bail in such cases. See section 12, ff. The extent to which such process is used and its resultant advantage are indicated in A. L. Beeley's, Bail System in Chicago. Univ. of Chi. Press (1922). See also, 1 Jr. of Crim. L. 778.

5. 3 Edw. I, c. 15, 1275. "And forasmuch as sheriffs and others which have taken and kept in prison persons detected of felony, and incontinent have let out by replevin such as were not replevisable, and have kept in prison such as were replevisable, because they would gain of the one party, and grieve the other; and forasmuch as before this time it was not determined which persons were replevisable, and which not—(certain persons are declared not to be replevisable, and others)—shall from henceforth be let out by sufficient surety, whereof the sheriff will be answerable, and that without giving ought of their goods. . . ." But as to the right of certain courts to release on bail for *any* offense, see 4 Blackstone's Commentaries 299.

6. 31 Chas. II, c. 2.

7. 4 Black. Com. *298.

8. Stat. 11 and 12 Vict. c. 42, sec. XXIII: "Where any person shall appear or be brought before a Justice of the Peace charged with any Felony—(or with certain misdemeanors)—such Justice of the Peace may, in his Discretion, admit such Person to Bail, upon his procuring and producing such Surety or Sureties as in the Opinion of such Justice will be sufficient—" See also 9 Halsbury, Laws of Engd., p. 328.

9. 9 Halsbury, Laws of Eng'd., p. 324.

10. Such statements as these are made upon the authority of the annotation of the Code, to which readers of this article are referred for specific citation. The annotation contains an admirably complete collocation of constitution and statute references on all phases of this subject.

11. Sutherland, Criminology, p. 213.

12. Sec. 11 Jr. of. Crim. L., 386, 393.

13. Section 67 provides that in capital cases where the proof is not evident, etc., the courts "may" release on bail, in their discretion.

14. An annotation suggests changes in phraseology, appropriate to particular constitutions.

The Code recognizes that even such limited judicial discretion would be unconstitutional in most states and if such constitutions are not changed, offers a substitute, section as follows: "All persons in custody for the commission of an offense not capital shall, before conviction, be entitled, as of right, to be admitted to bail." For citation of the various state constitutions, see the Code, p. 263.

edied by section 89 which declares that, among other things, "if a person applies for admission to bail who within two years last prior to such application has been, to the knowledge of the person taking bail, *convicted* of a felony, the undertaking shall contain a condition that such person will not commit any felony during the period of his release on bail."

Financial Responsibility of Sureties

Another difficult yet important problem is to assure financial responsibility without making it unduly impracticable for an accused to furnish bail.

The theory on which bail is required is that the accused will put in his appearance rather than lose the amount of his bail, or, if the loss will fall on someone else, that such other person will compel his appearance rather than stand the loss. Of course if the bondsman is financially irresponsible and can not be made to pay the bond if it be forfeited, his incentive to have the accused in court at the proper time does not exist. Financial responsibility, actual collectibility of the bond, is therefore extremely important.

The ideal law to this end would be a simple directory provision, either express or as in Michigan merely implied, that judges or other officers who release on bail must insist on financially responsible bondsmen. To this obvious requirement is sometimes added, in Ohio and Illinois for example,[15] a provision that "the sureties must be worth double the sum to be secured and have property in this state liable to execution equal to such sum."

Unfortunately for the ideal, however, report after report of investigators demonstrates that judges do not and will not in practice insist on financially responsible bondsmen.[16] They have not done so in the past and there is no reason to suppose that they will in the future.

To remedy this evil, there was a proposal that the Code set up certain simple standards to which acceptable sureties must conform and then declare that any judge who should accept sureties not up to the standard be personally liable in case of default and failure of the surety to pay. The idea was not to make the judge guarantor of the collectibility of bonds, but to hold him responsible for his own dereliction of duty in accepting sureties which the law did not permit him to accept. No judge could be expected to certify the responsibility of sureties, but any judge can be expected to require that they make whatever showing of responsibility the law requires that they make.

This was not a wholly unprecedented proposition. So far back as the 13th century a statute having declared that certain accused persons might be "let out by replevin" and how, provided, "and if the sheriff, or any other, let any go at large by surety, that is not replevisable . . . he shall lose his fee and office forever."[17] A statute of 1554 after a recital of the disregard by justices of the laws permitting them to "let to bail" declares that any justice of the peace who shall "offend in anything contrary to the true intent and meaning" of the law shall be punished by a fine.[18]

This proposal in the broad form suggested was thought to be inadvisable, but the Code does contain a provision, section 117, that:

"Any official who takes bail which he knows to be insufficient, or accepts a surety in an undertaking knowing such surety not to possess the qualifications or sufficiency required by law is guilty of a misdemeanor and shall be imprisoned not exceeding —— years or fined not exceeding —— dollars or both at the discretion of the court."

An obvious method of assuring collectibility of forfeited bail would be to prohibit release unless the amount of bail be deposited in cash with the court. Such an arrangement while quite wise from that point of view, would make it extremely difficult to get bail in many cases where release should be granted. The bail bond is practically a necessity, if its collectibility can somehow be reasonably assured.[19]

To that end, another suggestion considered by the draftsmen was that either bail bonds or an actual deposit of property be permitted, but that if the release be on bond, the bond must be secured by a lien on specific real estate. This would have included, of course, some sort of showing by the bondsman that the real estate offered as security had a net value over and above all other liens sufficient to secure the bond.

The idea behind this suggestion was threefold. In the first place it would be assurance of the collectibility of the bond.

In the second place and, judging from the bail bond investigations, of almost as much importance it would both facilitate and expedite the collection of forfeited bonds. It is said that a certain amount of the distressing failure to collect on forfeitures is caused not by the financial irresponsibility of the bondsman but solely by the cumbersomeness of the necessary procedure and the preoccupation of the prosecutor's office in other matters. Were every bond a lien upon real estate, limiting the extent to which the property could be put up for other bonds and hampering its disposal, there would be incentive for the owner to pay the amount and clear the lien on his own initiative. In case compulsory payment were necessary, the foreclosure of the lien could be accomplished more quickly and simply than can collection by existing available methods.

In the third place, the fact that the bond is a lien on specific property would tend to expedite the setting of a case for trial. The professional bondsman who can now go on so many bonds as the court will permit by merely swearing that he is worth twice the

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15. Throckmorton's Ohio Gen'l Code of 1926, § 13524. See also Cabell's Ill. Rev. Stat., 1927, Ch. 38, Par. 639.

16. Cleveland.

Municipal Court

Bonds forfeited	$ 61,200.00
Suits filed	46,900.00
Judgments rendered	30,600.00
Judgments collected	965.10

County Court

Bonds forfeited	$263,400.00
Judgments rendered	59,262.00
Cases pending	100,000.00
Collected	2,701.00

—From, Criminal Justice in Cleveland (1922).

As indicating that conditions in Cleveland have not improved: "In the courts of this county and city this (bail bond) procedure has come to be a farce. Prisoners are turned loose under bond to prey upon the community and fail to appear for trial. . . . Their bondsmen rarely pay even the costs of the cases which may be brought upon their forfeited bonds. . . . Bonds are accepted without proper investigation of the financial worth of the proposed sureties." "Forfeitures, $119,846; collected thereon, $125.00." Bulletin of the Cleveland Ass. for Crim. Justice, Sept. 30, 1925. "In this matter indifference and laxity still prevail to a shameful degree." *Id*, March, 1926. "Still . . . unsatisfactory." *Id*. March, 1927.

Chicago.

"Estimates of the amount of forfeited bail bonds which remain uncollected in Cook County run as high as four millions of dollars." Bull. of the Chi. Crime Com., March, 1924, p. 34.

"Bonds . . . are frequently given by irresponsible persons and almost as frequently are accepted with only slight investigation of the responsibility of the bondsmen." *Id*, Sept., 1926.

Missouri.

"Our records indicate, for example, that a widely known professional bondsman in St. Louis was not accepted by several of the judges, and that a large proportion of his bonds are accepted by one judge. This is an unfortunate indication that a judge was altogether too lax in the acceptance of this bondsman inasmuch as he was generally known to be a bad risk." Missouri Crime Survey, p. 191. See also its tables of uncollected forfeitures.

17. 3 Edw. I, c. 15; Strengthened, 27 Edw. I, c. 3.

18. 1 and 2 Philip and Mary, c. 13; See also Kelyng's Rep. 3.

19. As to the extent to which "cash bail" is used in practice, see Beeley's, Bail System in Chicago.

amount of the particular bond, has no incentive whatever to hasten the trial of any defendant. His own activities are in no way hampered by delay. But were each of his bonds a lien upon specific property and the number of his bonds necessarily limited by the value of his property, his only opportunity for a profitable business would be in a rapid turn-over. Delay in the disposition of proceedings against any one for whom he was bondsman would delay his opportunity to sign another bond and make another profit. Even in the case of one signing a single bond, not as a money-making proposition, there would be natural desire to have the case disposed of and the lien of the bond removed. The conventional dilatory tactics of attorneys for the defense would, it is arguable, be metamorphosed, under persuasion from bondsmen, into pressure for prompt proceedings.

Here too there is precedent for the general idea, although the plan has never really been given a trial. In 1921, the Ohio legislature enacted a comprehensive bail-bond law which provided for the appointment in certain counties of a "bond commissioner" whose approval should be a prerequisite to acceptance by a court of any bail bond. The statute required an acceptable surety to own "real estate within the county of a value, exclusive of liens thereon, equal to double the amount of the bond" and declared that "any recognizance or bond approved by the bond commissioner shall forthwith become a lien upon said real estate owned by such surety or sureties, until the recognizance or bond shall have been exonerated or discharged."[20]

In the following year, however, the Ohio supreme court held this legislation unconstitutional because it was not of general application to all counties. Were it not for this decision, or had the real estate lien provision been re-enacted, the reports of bail bond investigations referred to above might have been different.

In Illinois, the ineffectiveness of whose present law is indicated by the crime commission reports already noted, a legislative act of 1917 made "all recognizances and schedules taken in criminal cases . . . a lien for the full amount named, upon the property scheduled therein."[21] Two years later, however, the provision was repealed. The repeal is said to have been at the instance of real estate dealers who found their business hampered by the existence of such liens.

Michigan now gives to a judge with sufficient political courage, "power in his discretion to require any surety upon any criminal recognizance taken before him, to pledge to the people of the state of Michigan, real estate owned by said surety. . . ." It does not, however, make such a pledge obligatory.

Though this proposal to require a deposit or pledge of specific property for every bail bond was not thought wise by the draftsmen of the Code for various reasons, yet the desirability of eliminating irresponsible bondsmen and uncollectible bonds was unquestioned. It was clearly recognized that the theoretically ideal plan of simply leaving it to judicial discretion to secure responsible bondsmen does not work in practice. Certain sections of the Code therefore seek to protect the public by requiring that sureties have certain qualifications. Thus:

"If there is only one surety he must be worth the amount specified in the undertaking exclusive of the amount of any other undertaking on which he may be principal or surety, and exclusive of property exempt from execution and over and above all liabilities; if there are several sureties they must in the aggregate be worth that amount exclusive of the amount of other undertakings, and of the exemptions and liabilities mentioned above."

"Each surety shall justify by affidavit that he possesses the qualifications and sufficiency prescribed (by the preceding sections); and shall in such affidavit describe the property in respect to which he proposes to justify as to his sufficiency, stating the encumbrances thereon, by mortgage, judgement, or otherwise, and shall state the number and amount of undertakings, if any, entered into by him and remaining undischarged."[22]

The Code does not make judges liable for failure to investigate the qualifications of bondsmen; it is assumed that they will perform their duties properly. Neither does it contain any section making a false affidavit by a surety punishable. It is assumed that such a situation will be covered by the substantative law of each state, either as "perjury" or by more specific enactment.

These provisions, *if the judges require their observance* and if the sureties do not falsify in their affidavits,[23] should prevent the evils shown by the investigations referred to. It would be impossible under the Code, for example, for any judge lawfully to accept a Louis Bernstein on $100,000 face value of bonds upon a showing that he owned a half interest in property valued at $25,000, and mortgaged for $11,500.[24] Bernstein would have to specify his property, valued at one-half of $25,000, declare the $11,500 mortgage already on it and state any obligations on which he is already a surety. If he were surety on no other bonds, he could be accepted on bonds to the extent of $6,750 *and no more*. And to be acceptable for even that relatively small amount—small compared with the $100,000 for which he was accepted—he would have to make oath that the property is exempt from execution and that he is worth the amount *"over and above all liabilities."* This is a legal situation altogether different from the simple requirement that a surety must be "worth double the amount of the bail over and above *exemptions*."

Moreover, it is provided in another section that:

"The undertaking shall be a lien on any real property described in the affidavit required by section 84 from the time of the recording of such undertaking and affidavit in the county in which the property is situated."[25]

Thus, a Bernstein, having scheduled real estate as constituting his necessary property, would find himself unable to beat collection of a forfeiture by hasty sale, because the bond, having persumably been recorded, would constitute a lien thereon.

When the property described by the surety as that "in respect to which he proposes to justify as to

20. Page's Ann. Ohio Gen. Code, § 13523, ff., effective 1921.
21. Callaghan's Ill. Laws, 1917-1920, Par. 3998.

22. Sections 83 and 84: The italics are the writer's, to indicate the additions which the code makes to the existing usual requirements.

23. "Schofield scheduled a residence at 6700 North Ashland Ave., valued by him at $30,000, and incumbered with a $5,000 mortgage. Peter Calo, investigator for the State's attorney's office, valued the property at $22,000 and reported that the records show the mortgage to be for $7,500." Bull. of the Chi. Crime Com., Nov. 1926, p. 16. See also, Beeley's, Bail System in Chicago, p. 36.

As to the probable observance by judges, see Moley, "The Municipal Court of Chicago" published by the Chi. Crime Com. and the Ill. Assn. for Crim. Just., p. 37 ff.

24. 11 Jr. of Crim. L., 386, 391.

25. Sec. 108. Section 107 provides for transmittal of the affidavit and undertaking to certain officers and its proper recording.

his sufficiency" is not real estate, no lien attaches, nor is he required to deposit it with the court.

But even where no lien attaches, the collection of forfeited bonds is greatly facilitated by the Code. Failure to enforce payment has been a great evil. Many bonds under the existing system are, to be sure, obviously not collectible. This situation would be remedied by the Code provisions just discussed. But bail bond investigations have revealed the fact that in many cases no attempt, or only half-hearted attempts, to collect is made even when the bond is apparently collectible.[26]

In Detroit a year or two ago, the only officials who would be likely to know the facts stated that though they were sure that less than 20% of forfeitures were ever collected, they had no records from which it could be ascertained just what had been done. In other words, no real systematic attempt at collection had been carried on.

The common excuse for such a state of affairs is that the complication and cumbersomeness of ordinary procedure in suits to collect makes the cost in time and effort required exorbitant. The Code attempts so to simplify the procedure of collection as to cut all ground from under this excuse. It reads:

"If there is a breach of any condition of the undertaking, the court before which the cause is pending shall direct the fact to be entered upon its minutes and shall declare the undertaking forfeited."

"If, at any time within ten days after the bail has been forfeited, the breach of the condition of the undertaking is satisfactorily explained and the accused shall in all other respects have complied with the conditions of the undertaking, the court may direct the forfeiture of the undertaking to be discharged upon such terms as are just."

"If the forfeiture is not discharged as provided in the last section, it shall be the duty of the prosecuting attorney immediately after the lapse of ten days after the forfeiture, to proceed against the accused, or any surety, upon his undertaking, as follows: The prosecuting attorney shall file a certified copy of the order of the court or judge forfeiting the same, in the office of (the official whose duty it is to enter judgments) of the county wherein such order shall have been made, and thereupon the said official shall docket the same and enter judgment against the person bound by the undertaking for the amount of the penalty of said undertaking, and execution shall be issued to collect the amount of said undertaking: Provided, however, that no judgment shall be entered where money or bonds deposited as bail are forfeited."[27]

Although, as the annotation to the Code points out, this form of procedure is already in force in a few states, it would be a real change of the law in those states whose inefficiency in collecting forfeitures has been revealed by the investigations—Ohio, for example, where collection is as in civil suits, and Illinois, where procedure is by *scire facias*.

A further attempt to mitigate the "professional bondsman" evil while recognizing also its benefits, appears in section 90, requiring every surety to make affidavit as to what consideration or security he has received. A false statement is declared to be perjury and the surety's rights against other persons are limited to the promises set forth in his affidavit.

26. See the Bulletins of the Clev. Assn. for Crim. Justice, cited *supra*.

27. Sections 109 ff.

Amount of Bail

The amount of bail to be required is, of course, not stipulated by the Code as it must depend on the circumstances of each case. Here the judicial discretion is and must necessarily be unrestricted except by the constitutional provisions that excessive bail shall not be required.

There is always danger, however, in cases where the amount of bail is set by some official who is not wholly familiar with the circumstances of the case. To lessen this danger section 79 provides that before bail is fixed in serious cases, the official to whom application is made must notify the prosecuting attorney, and that notice may be given in other cases. The cases in which notice must be given are those named in section 70 (a), *supra*. Such a requirement is already in force in a dozen states. Notice is required also prior to a reduction in the amount of bail.

Again, "one of the abuses," says the annotation, "incident to the granting of bail is that a person refused bail by a magistrate or judge, peddles his application about until he finds a more complaisant one." Hence the Code provides; section 76:

"In all cases where admission to bail is discretionary, if application for bail is made to a competent court or official and denied, no subsequent application shall be made to a court or official of equal or inferior jurisdiction, unless an affidavit is filed with the application stating that new evidence material to the defense has been discovered and stating the substance of the evidence: Provided that the provisions of this section shall not apply to cases arising under section 78."

It will be noted that a change of circumstance such as would warrant a change of ruling is taken care of by the latter part. Moreover any possibility of abuse of discretion by the judge first applied to, any arbitrary refusal of bail, is guarded against by the fact that the section only precludes other applications to judges of equal or inferior jurisdiction. It permits application to judges of courts of record after refusal by a magistrate, or to appellate judges after refusal by a judge of primary jurisdiction. To make this section effective, section 75 requires an applicant for bail to state under oath what previous application he has made.

Cases of sickness after bail has been refused are taken care of by section 78, to the effect that a judge, after proper investigation, may admit to bail on that account.

The Code has, of course, the numerous other provisions necessary to set out in detail the law as to release on bail. These, however, follow essentially the generally established rules and do not seem to the writer of sufficient interest to warrant the space required to set them forth.

JUDICIAL COUNCILS IN MASSACHUSETTS AND CONNECTICUT REPORT

Bay State Council Proposes Plan for Relieving Congestion in Superior Court, Due to Motor Vehicle Accidents — Thinks Commission Should Not Be Resorted to until Plans for Dealing with Problems Effectively in Courts Are Tried Out—Renews Recommendation Arising from Sacco-Vanzetti Case—Proposals of Connecticut Council

THE fourth annual report of the Judicial Council of Massachusetts[1] was filed with Governor Fuller Dec. 17. The report is divided into three parts: First, new recommendations relating mostly to problems arising from motor vehicle litigation; second, renewal of recommendations from previous reports; and third, a summary of the work accomplished by the various courts during the last statistical year.

The report approaches motor vehicle questions from the angle of congestion in the courts. It is distinctly stated that, "problems requiring special knowledge of insurance rates and risks and involving questions of state policy, as to which there are very marked disagreements," such as proposals to repeal the compulsory insurance law or for an administrative commission or for a state insurance fund of any kind, are large problems beyond the scope of the Judicial Council and would require more time and study than the Council can give and still do justice to its other work. If the legislature feels that such subjects should be further studied, the Council suggests that a special commission should be appointed. The Council points out that experiments need to be tried now to meet the accumulating business, whether more radical changes are made later or not, because the problems of congestion will have to be met under any system.

The report gives figures showing that the Superior Court is becoming "swamped" with cases arising from motor vehicle accidents. The hope indulged in by some that the compulsory insurance law might decrease the amount of litigation has proved to be mistaken. The question therefore, is, how can the courts function in the face of this increasing litigation?

There are other controversies, according to the report, involving important rights and obligations, in which justice is as important as in motor vehicle cases, and many of these have to be sent to masters and auditors at an expense to the public of about $150,000 a year with additional expense and delay for the parties because so much time of the Superior Court is taken up with jury trials in motor vehicle cases; and jury cases of any kind generally have to wait about 15 months before they are reached for trial. During the year ending June 30, 1928, only 2,672 jury cases were tried in all the sittings of the Superior Court through the Commonwealth and at the end of that year there were 45,217 cases awaiting trial. The common suggestion for meeting congestion is to create more judgeships in the Superior Court, but the increase in judgeships has never solved the problem of congestion, but has merely postponed it.

Attention is called in this connection to public impatience with the delay and expense both to litigants and the Commonwealth in present methods of disposing of damage suits, and the opinion is expressed that unless the problem is solved by lawyers, it will be by laymen. Most of the proposals for a remedy are to remove all such cases from the courts and hand them over to some kind of Commission. As to this the Council says:

> "We do not believe in distributing the judicial functions to different commissions any more than is absolutely necessary. The industrial accident board has been a success and rests upon the special relation of employer and employee which lends itself readily to that form of administrative system for administering a fixed scale of compensation regardless of negligence. When we come to motor vehicle accidents, however, the situation is materially different and we believe that every reasonable experiment should be tried for disposing of these cases promptly by *judicial decision* with such modern methods as will assist in such prompt disposition. As far as we are aware, no plan has thus far been proposed in any state to deal with this problem effectively *in the courts.*"

To meet the situation the Council makes two recommendations. The first is "that the compulsory insurance law be amended so that the required insurance shall be against liability to be established by an action commenced in a district court, that no insurance be required against liability in actions commenced in any other court, and that the right to reach and apply an insurance policy or any other form of security after thirty days from the entry of judgment in an action for personal injury or property damage caused by a motor vehicle be limited to judgment creditors in actions for personal injury commenced in a district court." The report adds that in order to carry out the recommendation the present jurisdictional limits of the district courts would have to be removed. It continues:

> "Under this plan, we believe a considerable number of the personal injury suits now brought in the Superior Court would be brought in the district court in order to get the benefit of the security and a prompt hearing, and as defendants in many cases do not care for jury trials because of uncertainties and expense, we believe few of them would be removed from the district courts by the defendants. By using this procedure honest plaintiffs would get fair compensation more promptly and with less cost for lawyer's fees and expenses than under the present procedure. At all events, we think this experiment would be decidedly worth trying before we embark on any commission plan of administering this business. Doubts as to the effectiveness of this plan can only be answered by trying it."

The second recommendation is supplementary

1. The Council, created in 1924, for the continuous study of the judicial system and of the results produced by it, consists of: Hon. William Caleb Loring, former Justice of the Supreme Judicial Court, Honorary Chairman; Addison L. Green, Esq., of Holyoke, Chairman; Hon. Franklin G. Fessenden of Greenfield, former judge of the Superior Court; Hon. Joseph J. Corbett, a judge of the Land Court; Hon. William M. Prest of the Suffolk County Probate Court; Hon. Frank A. Milliken, of the District Court in New Bedford; and Messrs. Robert G. Dodge, Frederick W. Mansfield and Frank W. Grinnell, of Boston.

to the first and involves a more effective use of the judicial personnel. It is set forth as follows:

"To supplement the plan proposed above and to make it more effective in relieving the judges of the Superior Court of motor vehicle cases, we suggest that the Chief Justice of Massachusetts be authorized to designate fifteen justices, or special justices, of district courts from which number the chief justice of the Superior Court shall be authorized to assign one or more, as needed, to sit in the Superior Court, with or without juries, to try such cases arising from motor vehicle accidents as are brought in that Court.

"The use of district court judges in the Superior Court has been a success on the criminal side and we have recommended its continuance as vital to the public interest in the administration of the criminal law. Of course, it is not advisable to cripple the district courts either for their present or future work, but we believe the work of the judicial system should be distributed in accordance with some well-balanced plan."

The Council expresses the view that informal hearings are in the interest of justice, although realizing that "the Bar is not yet used to the idea," and recommends an act setting forth procedure for prompt informal hearings in the Superior Court. It believes such methods would appeal to the public. On this point the report says:

Competent and experienced judges "can try from three to five cases without a jury in the time during which it would ordinarily take them to try one case with a jury. With the rules of evidence waived and the elimination of all appeals and exceptions except upon question of substantive law, cases could be disposed of still more promptly, and we believe just as fairly, and a hearing before a judge resulting in a judicial decision could be conducted as promptly as a proceeding before an arbitrator."

Increased entry fees in the Superior Court are recommended as a means of relieving congestion and keeping many cases in the District Court where they properly belong. The report then takes up the matter of unprofessional practices. After referring to investigations in New York and Philadelphia, it says that the Council has no means of knowing to what extent the practices revealed in those cities prevail in Massachusetts. However, human nature is pretty much alike in different places and the same opportunities are likely to lead some members of the Bar to forget proper professional standards. It continues:

"At all events, it is common report that a 50-50 division between the lawyer and the client of the proceeds of a suit, whether obtained by settlement or verdict, is more or less common, and sometimes an even larger proportion is retained by the lawyer to cover doctors' fees and other expenses. With the opportunities for collusion with insurance adjusters, physicians, and others, it is sufficiently probable that objectionable practices are followed here to such an extent as to make it worth while to take action to prevent them. In view of the charges made by the insurance commissioner, we think that the public expects the legislature, the courts and the bar to take such reasonable measures as may be needed to check in future such unprofessional practices as may exist."

The Council renews the recommendation of an act for dealing with cases of professional misconduct contained in its second and third reports. It also points out that the practice of soliciting personal injury cases by paid "runners" is already illegal in Massachusetts and that attorneys in such cases have no legal right to deduct compensation for sums recovered, but adds that this fact is probably not generally known to clients. It further suggests: a rule of court providing that in personal injury cases the injured person should sign the declaration and give his name and address; appropriate rules in the Superior Court and in the District Courts for affording clients, so far as possible, summary relief against excessive or illegal charges, whether for services or expenses, and furnishing procedure for the prompt enforcement of rights under G. L. c. 2213, sec. 51; and a rule, or, if necessary, a statute, providing that in cases of personal injuries no attorney shall deduct, whether by previous agreement or not, more than an amount equal to 33 1-3 per cent of the amount recovered by settlement or otherwise for compensation and expenses, except with the approval of the court under special circumstances shown, on motion of the attorney after notice to the client.

Then follows an extended discussion of various radical proposals for dealing with motor vehicle accident claims by a commission outside of the courts. Attention is called to the legal and practical difficulties involved in such plans, and the Council says that it takes it for granted that the citizens of Massachusetts wish, if it is practicable, to dispose of their controversies before our existing courts, and that plans already recommended for the more effective use of the courts which we have should be tried before either new ones or commissions are created.

The Council renews, in a revised form, its recommendations of last Spring, of an act for the prompt disposition of petty offenses under motor vehicle laws and local traffic regulations without criminal record. It has also drawn an act suggested by the New Hampshire law of 1927, to force non-residents, who cause injuries in Massachusetts, to furnish security for the payment of damages thus caused. Furthermore as the state's compulsory insurance law does not require insurance to cover property damage, it recommends that the compulsory insurance law, if it is retained, be extended to include a requirement of $1,000 property damage. The additional cost of such insurance would be small. And in order to provide a more effective deterrent to perjury, it recommends that the maximum penalty for perjury, except in cases involving human life, shall be five years in state prison, instead of twenty years.

Among the important recommendations of previous reports which are renewed are the following:

That the scope of the appellate jurisdiction of the Supreme Judicial Court in murder cases be extended to include the unrestricted consideration of every judicial act of the trial judge. This was a recommendation which followed the Sacco-Vanzetti case. The Council considers it important, not only that the judgment of the trial judge on the weight of the evidence, or on the weight of any alleged new evidence, should be open to reversal if he is mistaken, but that it is in the interest of justice and of the public confidence in the courts that his judgment, if it is right, should receive the public support of the Supreme Judicial Court without certain traditional qualifications that now exist in the law.

That the Supreme Judicial Court be authorized to stay the execution of a sentence of death pending the decision of all judicial questions. This was one of the suggestions which Governor Fuller made with emphasis after his experience with several capital cases.

That defendants in criminal cases in the Superior Court, other than capital cases, be allowed the option of being tried without a jury at their own request with the approval of the Court. Such a system has been in satisfactory operation in Maryland for generations, and in Connecticut for the past five years or so.

Passage of an act to encourage the revision of writs so that a paper over the signature of the clerk and the seal of court shall say what it means so that a person served with such a paper can understand it, instead of saying, as it does now, what it does not mean.

Passage of an act to provide a more effective method of dealing with complaints of unprofessional conduct of lawyers. This act, which was drawn by the Council two years ago in a report made at the request of the legislature, would divide

the state into three districts and provide that the Supreme Judicial Court should designate a certain number of lawyers in each district with a chairman and a paid secretary, that those so designated should act as a committee of inquiry to assist the Court, that all complaints filed should be referred at once to the secretary and should be investigated and, if necessary, heard by a committee of three of the persons designated, etc.

That procedure be provided to separate debt-collecting from controversial litigation. This plan, which is effectively used elsewhere, provides for summary judgment where there is no real defence to an action to collect a debt.

Report of Connecticut Council

Chief Justice Wheeler and Secretary Richard H. Phillips of the Judicial Council presented to Governor John H. Trumbull the Report of the Council on Nov. 27. The report covers some 62 long typewritten pages, while the appendix containing copies of the proposed public acts which the Council recommends covers 84 additional pages.

It will be recalled the Judicial Council* was created under authority of Chapter 190 of the Public Acts of 1927. The act imposes upon this body the duty of studying the rules and method of procedure and practice of our judicial system, and also a study of the organization of, the work accomplished by, and the results produced by, that system and its various parts. The Council is required to report to the Governor upon the work of the various branches of the judicial system, together with its recommendations. It may submit for the consideration of the judges of the various courts such suggestions in regard to rules of practice and procedure as it deems advisable.

The Council at the beginning of its work sent a letter to the lawyers of the state requesting that they send to the Council suggestions for the betterment and simplification of procedure and practice. Many replies were received and some of them formed the basis for the recommendations and suggestions of the Council.

The Council also addressed a letter to the editors of the newspapers of the state with the expectation of securing from them a point of view removed from the professional point of view of the members of the Council. Helpful suggestions were received from editors of the state's leading newspapers which are receiving careful consideration.

Early in the Fall of 1927, the Chairman divided the Council into six committees: (1) Criminal Procedure and Practice; (2) Civil Procedure and Practice before and during trial; (3) Appellate Procedure; (4) Summary Judgment on Failure to Disclose Defense, Discovery, and Inspection of Documents; (5) Framing Issues in Advance of Trial and Reducing Issues to be Tried; (6) Statutory Changes Not Specifically Committed to Other Committees.

The Council requested the Yale School of Law, through Dean Robert M. Hutchins, to give it the benefit of the experience, study and judgment of its professors. Dean Hutchins at once replied that the Law School "would be more than pleased to co-operate in any possible way with the Judicial Council." Subsequently Professor Charles E. Clark was named as the official representative of the school in matters of interest to the Council.

The report recommends many changes in the existing practice and procedure tending to improve existing conditions and simplify the practice and in several instances resulting in decided pecuniary saving. Accompanying these recommendations and suggestions as appendices are proposed public acts or rules of court.

A glance at the list of subjects treated by the Council will indicate their practical nature and in many instances their wide public appeal. Each of these subjects is discussed in the report with comparative brevity and yet with sufficient fullness to give the chief reasons which impelled the Council to advocate the plan proposed. These subjects, according to a statement given out to the public, embrace:

1. The improvement of the Selection of Jurors.

2. The taking of Petty Offenses under the Motor Vehicle Act and Traffic Ordinances of all municipalities out of the category of crimes and providing for the payment for first and second violations of a moderate sum which may be made without a hearing.—Violations of this nature should not be crimes and the violators given a criminal record forever, the Council thinks.

3. The constitution of a Bureau of Identification, including Finger Prints, under the Commissioner of State Police.—The Council has drafted an Act after a study of the statutes on this subject by other states.

4. The appointment of judges of the City, Town and Borough Courts by the Governor instead of by the General Assembly upon the report of the Judiciary Committee.—The Report of the Council says: "It is our judgment that probably a greater number of our citizens obtain their idea of the administration of justice by the way it is administered in the City Town and Borough Courts than they do from the way it is administered in all the other courts of the state.

"Let the Governor make these appointments and let the General Assembly, Senate and House, confirm them and we will then have adopted the method of selection of our Supreme, Superior and Common Pleas Court Judges. This method has worked well and to the all but universal approval of the people of the state. Few duties which the Governor is called upon to perform will affect the lives and happiness of more of our people or do more for the state and her people."

5. Under the present statute any of these City, Town and Borough courts may impose sentence and suspend its execution indefinitely and, except in cases after commitment to the state prison or state reformatory, may during or after the adjournment of the term, after hearing, continue the case or suspend the execution of the sentence and commit the accused to the custody of a probation officer. The Council points out that this power to suspend is being abused by some of these courts and proposes as one of the remedies for this evil that the court before so acting shall cause the facts upon which such action is based to be made part of the record of such case. The remedies the Council proposes will tend to stop in large part the abuse of the suspended sentence as now practiced by requiring the action to be taken in open court and to be spread upon the public records with the reason for suspending sentence.

6. The examination of jurors to be made by the Presiding Judge.—Under the present statutes counsel examine the jurors one at a time, taking at times days before a jury is obtained, wasting a large amount of the court's time and at an expense to the state, entirely unnecessary, of thousands of dollars each year.

7. The Council also proposes the amendment of the statute which prohibits comment by counsel for the state on the failure of the accused to testify, so as to permit such comment.

8. In most of the state courts, and all of the Federal Courts the prosecuting officer presents to the grand jury the testimony of the witnesses. In Connecticut the prosecutor is not permitted to present this evidence to the grand jury. The Council proposes giving him this authority but guarding its exercise by forbidding the prosecutor to express an opinion on the evidence or to be present at the discussions or deliberations of the grand jury. Under the present practice generally some attorney is selected to serve on the grand jury for the

*The members of the Council consist of: George W. Wheeler of Bridgeport, Chairman, Chief Justice of Supreme Court of Errors; Arthur F. Ells of Litchfield, Judge of Superior Court; Charles B. Waller of New London, Judge of Common Pleas Court; Joseph G. Shapiro of Bridgeport, Judge of City Court of Shelton; James E. Wheeler of New Haven; Arthur M. Brown of Norwich, State's Attorney; Ernest A. Inglis of Middletown, State's Attorney; Donald J. Werner of Salisbury and Richard H. Phillips of Hartford, Secretary. Mr. Phillips succeeded Judge Charles D. Lockwood of Stamford, resigned.

purpose of examining the witnesses. The Council is of opinion this should be done by the state's attorneys who are sworn to do their duty and are selected by the judges for their high character and professional skill.

9. The Superior Court cannot at present send a case to a state referee to try unless the lawyers consent. State referees are state officers and the courts should, the Council thinks, have the power to control the business of the courts. It recommends an amendment of the statute affecting this result.

10. The amendment of the act providing for the civil and criminal terms of the Superior Court so as to make it possible to keep the judges continuously engaged by giving the judge holding a criminal term power to go on with civil business at the conclusion of the criminal business. The present arrangement of these terms makes it difficult to have the judges continuously engaged. The Council submitted the proposed act to the allotment committee of the judges and they approved of it.

11. The Council is engaged in the work of revising the present appellate procedure which is thought to be too cumbersome and expensive. It proposes an act giving the judges of the Supreme and Superior Courts power to make rules concerning appellate procedure, while leaving the present method in force until such time as the judges may adopt a new method. Meantime the Council will submit to the judges its suggestion as to the proper rule or rules to adopt. The Council is of the opinion that this intricate and highly technical work can be better done by the judges who can give it more time and study than a legislative committee can.

12. The Council recommends that all divorce actions shall be continued for ninety days, thus providing an opportunity for composing the marital differences. The present statute has resulted in a practice which is against the public interest. The Report says the judges disapprove of the present statute.

The Council has made suggestions to the judges upon a great variety of subjects: Those as to summary judgments, charges to the jury, requests to charge the jury, procedure on the appeal in criminal cases by the state, the provisions as to a permanent trial list and as to the assignment of cases, have already been acted upon by the judges substantially in accordance with the suggestions of the Council except in one instance, and in that the Council says the judges have improved on their suggestion.

Those as to prohibiting argument on objections to evidence unless requested by the court, encouraging opening statements in cases to jury or court, and giving greater latitude in the asking of leading questions, the union of all motions and demurrers in a single pleading, the method of administering the oath to witnesses, the denial of costs where a case has been brought in the high court without reasonable cause, and a procedure for the simplification of criminal pleading, have been recently presented to the judges and not yet acted upon.

A number of other important matters are now under consideration by the Council.

DEPARTMENT OF CURRENT LEGISLATION

Federal Legislation of 1928—II

PREPARED BY MIDDLETON BEAMAN, CHARLES F. BOOTS, ALLAN H. PERLEY, JOHN O'BRIEN, AND ALFRED K. CHERRY

Administration of Justice

TWO Acts deal with writs of error in Federal practice. The net result of them appears to be to leave the law exactly the same as it was before the first Act was passed except that there are now two modes of review designated as "appeal"—the first the old appeal, and the second the old writ of error.

The first of these Acts (Public 10), passed in January, provided in section 1 that the writ of error is abolished and that all relief which theretofore could be obtained by writ of error "shall hereafter be obtained by appeal." Section 2 of this same Act provided that in all cases where an appeal might be taken as of right it should be taken by serving notice on the adverse party and filing written notice of appeal with clerk of the court from which review was sought. No petition or allowance of appeal was to be required. A proviso stated that the review of judgments of State courts should be petitioned for and allowed in the same form as theretofore provided by law for writs of error to such courts.

The second Act (Public 322), passed in April, did not disturb section 1 of the January Act but provided that section 2 of that Act should be "amended to read as follows":

> "Sec. 2. The statutes regulating the right to a writ of error, defining the relief which may be had thereon, and prescribing the mode of exercising that right and of invoking such relief, including the provisions relating to costs, supersedeas, and mandate, shall be applicable to the appeal which the preceding section substitutes for a writ of error."

The provisions of section 2 of the January Act are therefore no longer in force. As to the method of review exercisable by appeal before the January Act, the simpler mode of exercising the right introduced by that Act is now gone and petition and allowance of appeal is again necessary. As to review which prior to the January Act was exercisable by writ of error, the language of the substituted section 2 of the April Act seems clearly to require that all the old provisions relating to "writs of error" shall be observed in taking the form of review formerly known as "writ of error" and now to be called on "appeal." The report of the Committee on the Judiciary of the House of Representatives in reporting the April bill (which passed without amendment by the House or by the Senate) called attention to the dangers of following the system set forth in the January Act, and

particularly to the great abuse that might arise if an appeal might be taken without an allowance. Fear was expressed that the docket of the Supreme Court would be burdened very greatly. The committee report also called attention to the fear that the January Act required no bond for costs. The report further stated that the Chief Justice and another member of the Supreme Court appeared before the committee and approved the amendment. No committee report was presented when the bill was reported to the Senate. Senator Norris, Chairman of the Judiciary Committee, stated on the floor of the Senate when the bill was under consideration that the Supreme Court had become "alarmed at the number of cases that were coming up in this way."

To remove doubt as to the jurisdiction of the Circuit Courts of Appeals to review interlocutory orders or decrees of the District Courts of Alaska, Hawaii, Philippine Islands, and the Canal Zone, Public 264 amends the Act of February 13, 1925, to include these courts so that appellate jurisdiction in such cases is now the same as from the District Courts in continental United States.

Administration

The Postmaster General is authorized to enter into contracts for air mail to foreign countries and insular possessions for periods of not more than ten years at rates to be fixed by the Postmaster General per pound or per mile, not to exceed $2 per mile. It is interesting to note that in the awarding and interpretation of the contracts the decision of the Postmaster General is to be final and not subject to review by the Comptroller General.

A revision of postal rates is provided in Public 566. The most interesting provisions to the ordinary citizen are the reduction to one cent of the rate on private mailing cards, and the admission to special delivery privileges of all classes of mail matter.

Economy and efficiency in the Government service is advanced by Public 611 which provides for the discontinuance of over 125 reports required to be made to Congress. It has been a common practice in the past to attach to many Acts a provision that a full report of the action taken under the Act should be made to Congress at each session. Many of these special reports were totally unnecessary and many covered by general law and resulted in duplication of work and the accumulation of a large mass of material in the files of Congress. The Act shows the value of the new Committee on Expenditures in the Executive Departments recently created in the House of Representatives.

The Court of Claims decided in Export Oil Corporation vs. United States (1922) 57 Court of Claims 519, that no action could be brought against the United States on an oral contract made with the War Department when the contract was to be performed within sixty days but involved more than $500. Public 610, applicable to all divisions of the War Department, supersedes five former particular statute of frauds laws. The new law provides that only contracts must be in writing which are both in excess of $500 in amount and not to be performed within sixty days. The Act, with a view to later legislation regulating the making of all departmental contracts in respect of the requirement of reduction to writing, provides that its provisions shall cease to be in effect after June 30, 1930.

A ray of hope to claimants against the United States is offered by Public 247 which provides that when the Comptroller General finds a claim that may not lawfully be adjusted by the use of an appropriation already made but which in his judgment "contains such elements of legal liability or equity as to be deserving of the consideration of Congress" he is to submit it to Congress by special report, with his recommendations.

Revision of the Laws

Continuation of the United States Code is provided in Public 620 which authorizes a supplement containing the general and permanent laws of the 69th Congress and a correction of errors and omissions in the Code. An annual supplement is also provided for to contain the general and permanent laws of each session, cumulative in each case. The matters set forth in the supplement are in the same manner as the original Code to establish prima facie the laws of the United States general and permanent in their nature. The Act also provides for the printing, publication and distribution of a code of laws relating to the District of Columbia, which is now under preparation.

Further progress in the revision of the laws is helped by Public 413 authorizing the President to have the laws of the Canal Zone revised and codified and reported to Congress for its approval. The President is further authorized to report with the code such changes in the laws as he deems necessary or wise.

District of Columbia

When money or personalty is deposited in or entrusted with a depositary bank payable to, or receivable by, one of several persons and the property is delivered to one of them the liability of the depositary ceases by the provisions of Public 390. This law, applying to the District of Columbia, is similar to many State laws on the subject. It differs, however, from the usual statute in that its application is extended to include deposit and collection items and several ownership of shares of stock of building associations doing business within the District. An additional differing section prohibits the delivery by any garnishee of an asset deliverable to one of several persons when such asset has been attached until the attachment shall have been dismissed or disposed of by the court. Payment or delivery under court order by garnishee constitutes discharge of the garnishee's liability in respect of the property attached. The credit or property of a partnership is excepted from the operation of the Act.

Public 380 makes the Uniform Fiduciaries Act law in the District of Columbia.

The law relating to the qualification and registration of architects in the District of Columbia is amended in Public 571. In addition to the correction of inaccurate references, the amendment removes ambiguities occasioned by overlapping provisions and inept phraseology. Indefiniteness in the penalty clause resulting in failure to prosecute violations of the old law is cured. The most interesting change relates to the procedure in revoking a license to practice. Formerly, after preference of charges and hearing before the controlling board of examiners, a decision by the board was final.

In the new law, after an adverse decision, the accused architect may obtain review of matters of law by petition, stating the evidence and his exceptions, to the Court of Appeals of the District of Columbia. Upon issuance of a writ of error by the court and review of the record, the court may affirm, reverse, or modify the decision of the board. This provision was inserted with the idea of affording judicial review in such cases lest the accused be denied due process of law. The board is given the additional new power of compelling the attendance and testimony of witnesses and the production of books and papers, enforceable by application to any justice of the Supreme Court of the District of Columbia, subsequent failure being punishable as contempt of court.

The Court of Appeals of the District of Columbia in Wilkinson v. Dougherty (1928) 24 Fed. (2d) 1007 decided that in cases arising under the Act of Congress providing for the widening, straightening, or extension of streets of the District of Columbia failure to give actual notice to persons whose land was assessed for benefits was a denial of due process of law since the determination of the property benefited and the amount of benefits was a judicial and not a legislative function. To remedy this defect in the improvement law, Public 573 provides that when a condemnation jury assesses benefits against land no part of which has been taken and the owner has not received notice of the condemnation proceedings, the Commissioners of the District of Columbia shall give notice by registered mail to the owner of record of the land. In addition to this notice, the Supreme Court of the District, prior to confirmation of the jury's verdict, must publish by advertisement once in each of three daily newspapers of the District the amount assessed against each parcel, stating the time during which interested parties may file objections and exceptions to the verdict.

Public 419 provides a Workmen's Compensation Act for the District of Columbia. It was the result of years of bitter conflict and, as usual in such cases, is a compromise. The Act makes applicable the provision of the Longshoremen's and Harbor Workers' Compensation Act of March 4, 1927, to the injury or death of an employe of an employer carrying on any employment in the District of Columbia irrespective of where the injury or death occurs. The Act is not to apply in the case (1) a master or member of a crew of any vessel, (2) an employe of a common carrier by railroad when engaged in interstate or foreign commerce or commerce solely within the District of Columbia, (3) an employe subject to the provisions of the Federal Employes' Compensation Act of September 7, 1916, or (4) employes engaged in agriculture, domestic service, or employment that is casual and not in the usual course of a trade, business, occupation, or profession of the employer The Longshoremen's Harbor Workers' Compensation Act is administered by the United States Employes' Compensation Commission and provides for compulsory insurance in private companies or by self insurance with the approval of the commission. The Act took effect July 1, 1928.

A new law (Public 618) regulating the labor of children in the District of Columbia has displaced the antiquated Act of 1908.

Children under 14 years may not be gainfully employed except in delivering or selling newspapers or in street trades under specified conditions. The eight hour day is established for children under 18 and there are other limitations as to time or character of employment. Noteworthy is the provision that no minor may be employed in a place which, after hearing, the Board of Education of the District of Columbia determines is prejudicial to his life, safety, health, or welfare. Employment in certain occupations is prohibited in the Act. The education authorities, as is usual in the United States, enforce the Act. They grant permits needed for work by children under 18, or badges for street trades, and inspect places of employment.

Minors engaged in street trades in violation of the Act, for the first offense are to be warned by the Department of School Attendance. In the case of a subsequent violation, if the court thinks that the parent or guardian of the minor is lacking in proper parental care the child may be committed to the Board of Public Welfare until of age or for a shorter period, but the court may suspend execution of judgment and commit the child to the supervision of the probation officer. Upon recommendation of the principal of the school a minor is attending or upon complaint of the school attendance officer, the badge of any minor who violated the Act may be revoked. The Juvenile Court of the District of Columbia is given jurisdiction of all cases arising under the Act.

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THE NEW SUMMARY JUDGMENT RULE IN CONNECTICUT

Thorough-Going Provisions Not Only Help to Secure Quick Justice for Claimants But Furnish Easy and Direct Way to Dispose of Large Volume of Litigation—Text of Rule—Validity Hardly Open to Question—Adoption of Plan by Rule of Court Is Interesting Feature—Importance of Administration and Responsibility of Bench and Bar

By Charles E. Clark
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On November 12th, 1928, the judges of the Superior Court of Connecticut,[1] acting pursuant to the rule-making power accorded them under Connecticut practice,[2] adopted a thorough-going summary judgment rule, effective February 1st, 1929, as an addition to the procedure of this state. The new provisions afford a means whereby judgment may be entered summarily in specified types of cases, including commercial cases and other recurring but simple forms of action, where it appears from affidavits of the parties that no real defense to the plaintiff's claim exists. The argument for the procedure most generally stressed is that it affords a means whereby judgments may be more speedily secured, particularly where court dockets are congested, and the interests of plaintiffs thereby better safeguarded.[3] But its simplicity makes it more generally useful than merely as a device for securing quick justice for claimants, important though that result is. It also furnishes an easy and direct way of disposing of a large amount of important litigation and should therefore prove of great value to the courts and the judges, and to those defendants who are interested in the proper adjudication of their causes. The only persons to whom the new procedure should not appeal are those who aim to profit by the law's delays. All others should find it a most valuable addition to the existing court processes.

The new practice was very carefully studied before its acceptance by the judges. The whole course of events leading to its adoption is a striking object lesson of the value of two important factors in the administration of justice in this state, the newly created judicial council, and the rule-making power long exercised by our judges. The summary judgment rule has been an important feature of English practice since 1875.[4] It existed earlier in a few American jurisdictions.[5] It has been employed for some time in the English colonies and the experience in Ontario is especially valuable to us. It was adopted in New Jersey in 1912 and in New York in 1921 where it has had a most extensive use.[6] Students of judicial administration generally commend it and it is incorporated in the rules adopted by the American Judicature Society as model rules for practice in civil actions.[7] In this state the New Haven County Bar Association in September, 1927, acting upon a report of its committee upon congestion of business in the courts, recommended it.[8] When the Connecticut Judicial Council[9] organized in 1927, it began an investigation of the subject. The Council requested assistance of the Yale Law School, under whose auspices an extensive report was prepared covering the summary procedure rules and decisions of other jurisdictions.[10] Meanwhile the Council appointed a committee of its members, consisting of Judge Arthur F. Ells, Chairman, Judge Joseph G. Shapiro, and Judge Arthur M. Brown, to whom this report was referred. Judge Shapiro made a special study of the subject. On October 8th, 1928, the Judicial Council, acting upon the report of its committee, approved a statement to the judges of the Superior Court setting forth the advantages of the proposed practice and presenting a draft of a rule to make it available in this state. This statement was referred for consideration to a committee of the judges consisting of Associate Justice Hinman and Banks of the Supreme Court, and Judges Wolfe, Avery, and Jennings, of the Superior Court. Upon the report of the latter committee, the judges adopted the rule as drafted by the Council with slight textual changes.

The rule as adopted is as follows:

1. In all actions to recover a debt or liqui-

1. The judges of the Supreme Court of Errors are also judges of the Superior Court. See Sec. 5450, 5489, Conn. G. S. 1918.

2. See Secs. 5471-5477, Conn. G. S. 1918.

3. It is advocated especialy upon this ground in the model rules of civil procedure of the American Judicature Society. See Rules of Civ. Proc., Am. Jud. Soc. Bull. 14 (1919), art. 23, Secs. 1-11, and note thereon.

4. As applied to bills of exchange only it has existed in England since 1855. See references note 6, infra.

5. In South Carolina, Kentucky, and the Virginias. See R. W. Millar, Three American Ventures in Summary Civil Procedure, 38 Yale L. J. 193 (1928).

6. It also is permitted in certain states to a more or less extent, including Michigan, District of Columbia, Delaware, and Pennsylvania. For discussion of the rule as applied in other jurisdictions, see article by Mr. Charles U. Samenow and the writer, referred to in note 10, infra. See also, the writer's book on Code Pleading, 1928, pages 381-385, and other references infra in this article.

7. See note 3, supra.

8. See pages 5, 8, and 9, of the printed report of the committee dated September 16th, 1927, adopted by the Association on September 23rd, 1927. The committee consisted of Messrs. David M. Reilley, Cornelius J. Danaher, Charles E. Clark, Samuel Campner, and David L. Daggett. A bill providing for summary judgments had been introduced into the 1927 legislature but failed of adoption.

9. Authorized by Chapter 190 of the Public Acts of 1927.

10. An extended research in the subject was made by Mr. Charles U. Samenow, a student at the Yale Law School. An article embodying the results of that research, including the material laid before the Judicial Council and some additional matter, by Mr. Samenow and the writer hereof, will appear in the February, 1929, issue of the Yale Law Journal.

dated demand in money, with or without interest, arising:

(a) On a negotiable instrument, a contract under seal or a recognizance; or

(b) Any other contract, express or implied excepting quasi contracts; or

(c) On a judgment for a stated sum; or

(d) On a statute where the sum sought to be recovered is a fixed sum or in the nature of a debt; or

(e) On a guaranty, whether under seal or not, when the claim against the principal is in respect of a debt or liqudated demand only; And in all other actions;

(f) For the recovery of specific chattels, with or without a claim for withholding the same provided that if such claim be for other than nominal damages and be unliquidated it may be severed and proceeded with as provided in paragraph two;

(g) To quiet and settle the title to real estate or any interest therein; or

(h) To enforce or foreclose a lien or mortgage; or

(i) To discharge any claimed invalid mortgage, lien or caveat or lis pendens; final judgment shall be entered by the Court at any time after the defendant has appeared, either before or after an answer has been filed, upon written motion and affidavit of the plaintiff or of any person having personal knowledge of the facts verifying the cause of action, and the amount he believes to be due and his belief that there is no defense to the action, unless the defendant, within ten days after the filing, in duplicate, of such motion and affidavit or within such further time as the Court for good cause shown may prescribe, shall show by affidavit such facts as may be deemed by the Court sufficient to entitle him to defend.

2. If it appears that such defense applied only to part of the plaintiff's claim, or that any part is admitted, the plaintiff may have final judgment forthwith for so much of his claim as the defense does not apply to, or as is admitted, on such terms as may be just; and the action may be severed and proceeded with as respects the remainder of the claim.

3. If the Court, upon the filing of the affidavits as provided in paragraph 1, shall be of opinion that the only question or questions arising are bona fide questions of law, it shall file its finding so stating and that defendant has no defense on the facts, and thereafter the defendant shall, if he so desires, file within ten days a pleading appropriate to test such question or questions of law. If the defendant fails to file such pleading within ten days or within such further time as the Court for good cause shown may prescribe or fails to prevail thereon, final judgment, as of course, shall be entered by the Court for the plaintiff.

4. The provisions of these rules shall apply to counterclaims, and to all pending actions.

5. The foregoing rules are exclusive as to all causes of action therein contained, except as to actions of foreclosure, and as to those they provide an alternative remedy to Section 90 of the Rules of Practice.

6. If the action is one by or against a corporation the affidavit of any officer thereon shall be deemed sufficient, if otherwise complying with the provisions of these rules.

It is to be hoped and expected that this new procedure will develop easily and naturally as an important part of the practice of our state. In the remainder of this article it is proposed to discuss certain interesting matters which the rule suggests.

A first question may arise as to its validity. The claim has at times been advanced that a party may by this practice be deprived of his constitutional right of trial by jury. This point has, however, been so thoroughly settled by the precedents in other jurisdictions that it would seem no longer open to question. The practice is derived from the inherent power of a court to strike out a pleading which is shown to be false. The general power is an old one and, as pointed out above, the particular practice was extensively used in certain states long before the adoption of code procedure.[11] A determined attack was made upon the rule in New York because of certain expressions in an early New York case which seemed to indicate that an answer fair on its face could not be shown to be false except by a trial.[12] But in extensive opinions, both in the Appellate Division of the Supreme Court and in the Court of Appeals of New York, the power of the court to enter summary judgments was thoroughly established.[13] In fact this new procedure, which was brought into that state by rule of practice,[14] has been by many considered a more important reform than the entire civil practice act of 1921.[15] A similar decision supporting the rule was reached in New Jersey.[16] There is nothing in any way unfair to either party in the procedure. Wherever a real defense is disclosed the case takes its regular course for trial. Only where the defense is sham and the party is seeking delay has he cause to object to the procedure. Surely under our practice no one should have a constitutional right to delay.

Another interesting feature of the new procedure as it affects our state is its adoption by rule of court. Modern authorities are agreed that the best form of regulation of procedural matters is under the rule-making power of the court, rather than by legislative act. Control by the Legislature can only be spasmodic at best and due to the pressure of other business and the short legislative session cannot be as carefully considered as rules recommended to the judges by the Judicial Council and passed upon by the judges. In fact some

11. See article by Professor Millar, cited note 5, supra.

12. Wayland v. Tysen, 45 N. Y. 281 (1871).

13. General Investment Co. v. Interborough Rapid Transit Co., 235 N. Y. 133, 139 N. E. 216 (1923). See discussion, giving the common-law precedents, by Mr. Justice Page, Chairman of the Convention which adopted the rules of Civil Practice, in Hanna v. Mitchell, 202 App. Div. 504, 196 N. Y. S. 43 (1922), affirmed 235 N. Y. 534, 139 N. E. 724 (1923); Dwan v. Massarene, 199 App. Div. 872, 192 N. Y. S. 577 (1922).

14. N. Y. civil practice rule 113.

15. See E. R. Finch, Summary Judgments under the Civil Practice Act in New York, 49 A. B. A. Rep. 588 (1924); McCall, Summary Judgment under New York Rules, 10 A. B. A. J. 22 (1924); T. E. Atkinson, Pleading the Statute of Limitations, 36 Yale L. J. 914, 922; Rothschild, New York Civil Practice Simplified, 1926, 26 Col. L. Rev. 39, 53, 24 Col. L. Rev. 865, 870, 22 Col. L. Rev. 846. See also, 22 Col. L. Rev. 482; 23 Col. L. Rev. 496; 25 Col. L. Rev. 678. Mr. Justice Finch, of New York, in the article cited supra, estimated that by 1923, one case out of every ten in New York county was disposed of under the summary judgment rule and that the time of one court equivalent to one year and a half was saved. This ratio would seem to have been continued in later years. See Clark, Code Pleading, 1928, 383.

16. Eisele & King v. Raphael, 90 N. J. Law, 219, 101 A. 200 (1917); Witteman v. Giele, 99 N. J. Law, 478, 123 A. 716 (1924). Similar decisions exist in other states. See the article cited note 10, supra.

modern authorities argue that legislative control of procedure is unconstitutional.[17] The manner of the adoption of the present rule, after the most careful preliminary study, indicates the value of our system. The combination of the rule-making power in the judges and an active, intelligent and interested Judicial Council, such as we fortunately have, seems ideal. Moreover change and improvement as may seem called for by the experience of the judges and the Bar with the new practice will be a simple matter as compared to the process of legislative amendment. If certain features of the rule need modification in the light of experience, such changes may easily be made under our system. In this connection, too, the aid of a united bar and of a law school to provide a background of research seems to have proven its value.

The need of amendment will, however, probably be less in this jurisdiction than elsewhere since it was possible to draft the Connecticut rule in the light of the extensive experience in other places. Following the experience of England and Ontario the actions in which summary judgments may be rendered are considerably more numerous and varied than as provided in the New York and New Jersey rules. The derivation of the various portions of the Connecticut rule enumerating the kinds of action in which summary judgments may be rendered is indicated in a foot-note.[18] It would seem that a most happy selection of actions has been made in view of the experience of other jurisdictions. One might, perhaps, ask why the enumerated actions should be chosen, and why either a lesser or a greater number, or even all actions, should not be subject to the same procedure. The answer depends on wholly practical reasons. The summary judgment rule will work best in the comparatively simple case where no defense or one easily set forth by affidavits may be expected. Where, due to the complexity of the case, the judges will hesitate to enter a summary judgment, the effect of the new procedure may be to slow up rather than expedite the administration of justice. Experience must therefore determine the character of the cases where it will prove most effective. Judging by the precedents of other places the choice here made is a sound one. If, however, additions or even omissions may later seem desirable these may be made as experience dictates. With reference to quasi-contractual claims, for example, our rule definitely specifies that the procedure is not available. In other jurisdictions the matter has been in some confusion.[19] The omission from our rule was made after careful consideration on the ground that in practice such actions would prove too complicated for the procedure. Perhaps later it may be possible to arrive at definition which would make the remedy available in the simpler actions of quasi-contract, while excluding the more involved types of suit. Liquidated claims on contracts implied in fact are expressly included.

In other jurisdictions much question has arisen in actions by or against corporations as to the person to make the affidavit.[20] This difficulty is avoided by the clear statement of Section 6 of the rule.

In other jurisdictions question has also arisen whether the judges on motion for summary judgment may pass upon questions of law raised by the affidavits.[21] By section 3 of the Connecticut rule, if the court upon the filing of the affidavits, is of the opinion that the only questions arising are bona fide questions of law, it shall file its finding so stating and that defendant has no defense on the facts. Then the defendant must file within ten days a pleading appropriate to test such questions or else final judgment shall be entered, as of course, for the plaintiff. Under this practice therefore the court's finding will settle the issues of fact, leaving only the questions of law to be determined on further pleadings if the defendant so desires. This is an important provision. Presumably the decision as to the effect of the facts stated in the affidavit will be of great practical value, and the occasions when questions of law will then arise will not be numerous. But occasionally at least the dispute will concern the bearing of some matters, such as the applicability of statutes of limitations or of the statute of frauds which, though necessarily treated as questions of fact under our practice, are in reality questions of law on substantially uncontroverted facts. Herein is afforded a comparatively simple means of quickly disposing of such issues.[22]

Some may ask why the present rule providing that the plaintiff may require the defense attorney to disclose to the court whether he has any defense in a pending action[23] is not sufficient, and why the new procedure is necessary. The reasons why the disclosure of defense rule is inadequate were well set forth by Mr. Robert H. Alcorn in an article in the last number of Connecticut Bar Journal.[24] The court in Jennings v. Parsons,[25] had

17. For recent discussions of the problem, see John H. Wigmore, Legislative Rules for Judiciary Procedure are Void Constitutionally, 23 Ill. L. Rev. 276 (1928), and State of Wash. ex rel. Foster Wyman Lumber Co. v. Superior Court for Kings County, Wash., 267 Pac. 770 (1918), reprinted in 12 Journal of the Am. Jud. Soc., page 70. For other discussions of the subject see Clark, Code Pleading, 1928, pages 32-33.

18. The 1 (a) of the rules is essentially like (B) of the English act, (b) of the Ontario rule, and in part or whole like the New York and New Jersey rules, the phraseology changed to correspond with Williston's Classification of Formal Contracts, as made both in his book on Contracts and in the restatemnt of the Law of Contracts for the American Law Institute. 1 (b) is the English (A), Ontario (a) and New York (1) and New Haven Bar Committee (1) in part. (c) is the Ontario and New Haven Bar Committee provision. (d) is the English C and the Ontario (c). (e) is the English D and the Ontario (d). (f) is the Ontario g and the New Haven Bar Committee provision. (g) is the New Haven Bar Committee provision. (h) is the Ontario h and the New Haven Bar Committee provision. (i) is a suggestion of the Judicial Council based upon its necessary analogy to (h). There were omitted the (e)—on a trust—and the (f)—in actions for the recovery of land (with or without a claim for rent or mesne profits)—of the Ontario act in part adopted in the New Haven Bar Committee provision. These were omitted because of the infrequency of the action and its ordinary complications, with the suggestion that it would be better to see how the recommended rule works before extending it to these actions. The New Haven Bar Committee report covered all the provisions of the present rule except (i) without, however, making the detailed specifications appearing in the rule. It will be noted that the procedure is not applicable to unliquidated claims, such as claims for breach of contract. Knight v. Abbott, 10 Q. B. Div. 11 (1882); Lawrence Textile Corporation v. American Ry. Exp. Co., 125 Misc. Rep. 858, 211 N. Y. S. 699 (1925); Joseph Mogul, Inc., v. C. Lewis Lavine, Inc., 247 N. Y. 20, 159 N. E. 708 (1928). Or for a tort. Poland Export Corporation v. Marcus, 204 App. Div. 302, 198 N. Y. S. 5 (1923).

19. Cf. Lee v. Graubard, 205 App. Div. 344, 199 N. Y. S. 563 (1923), and Cassidy v. Sullivan, 205 App. Div. 347, 199 N. Y. S. 566 (1923) with Poland Export Corporation v. Marcus, note 18, supra. See also, Perkoff v. Island Development Co. N. J. 133 A. 178 (1923), and Workman v. Lloyd Brazileno [1908] 1 K. B. 968, 978.

20. See Bank of Montreal v. Cameron, 2 Q. B. Div. 536 (1877), and Pathe Cinema v. United Theatres [1914] 3 K. B. 1253, the latter after amendment of the rule.

21. See Arden v. Boyce, [1894] 1 Q. B. 796; Stokes v. Tracy, [1920] 2 Ir. Rep. 444, and comments by Mr. Justice Finch in the article cited in note 15, supra.

22. Possibly the procedure might be further simplified by allowing the court, where the question of law is clearly presented on the affidavits, to decide it at once, giving judgment for either defendant or plaintiff as the case may require, without the additional step of a demurrer or other pleading by the defendant.

23. Rule 90, Practice book of 1922, page 262.

24. Robert H. Alcorn, Disclosure of Defense as an Aid to Summary Judgments, 2 Conn. Bar J., 291.

25. 71 Conn. 413 (1899).

construed the provision as not granting power to the court to pass upon the legal sufficiency of the proposed defense or to render judgment in favor of the plaintiff, if such defense was found to be legally insufficient. As Mr. Alcorn well says, in reaching this construction "the court took from the rule any power which it might otherwise have possessed in bringing a case to summary disposition. Practically, the rule now stands useless except in foreclosure cases, and when it is used, it is the practice of trial courts to allow any statement of defense, however thin and worthless it may be, to stand as a sufficient disclosure to satisfy the rule, because of the necessity of following Jennings v. Parsons. Instead of being the means of probing the conscience of counsel, instances have been noted where certain counsel have used it as a cloak for sham and falsity, and the trial court was left helpless."[26] It was therefore necessary for the judges either to amend the rule by incorporating the new procedure therein or to draw up an entirely new rule. They chose the latter course. It is believed that this decision is a wise one. Where an attempt is made to amend an existing procedure to permit of an entirely different one serious perils of draftmanship always occur and the result is often less valuable than an original new draft. Moreover in the present situation it was desirable to adopt a rule definitely following the procedure elsewhere, thus making available for this state the experience and the precedents of other jurisdictions.

It was stated earlier in this article that an important feature of the new procedure was its simplicity. Whether this will prove true in practice will depend in large measure upon its administration. The machinery at least is afforded by the rule; the actual operation of it depends upon the bench and the bar. It is well known that under our practice considerable motion, much of it seemingly waste motion, is necessary in getting a case to the stage of actual trial. This may include such matters as motions to compel the closing of pleadings, often continued for two or three weeks upon the short calendar, various claims for the trial lists and for the assignment lists, attendance upon the assignment of cases, and all the necessary steps and delays involved in getting a case actually to the stage of trial. Under the new rule all these may be eliminated except in cases where a real defense on the facts is shown. The plaintiff may file his motion and supporting affidavits either before or after an answer is filed, and then the defendant must reply within ten days unless he has secured an extension of time for good cause shown. Where either the defendant files his affidavit or fails to do so within the allotted time the judge takes the papers without further procedure and passes upon the motion. Not only is no claim for a short calendar hearing necessary but no such claim is proper inasmuch as no formal hearing is called for. Undoubtedly a judge may request the assistance of arguments if he so desires but the rule does not compel such course. In the counties where the docket is not crowded the clerk will undoubtedly hand to the presiding judge the files of all cases ready for disposition under this practice as they may arise. In the more crowded places the clerk might well follow the practice of presenting all the files of such cases to the presiding judge at a certain time each week. The simpler the procedure is kept the more workable it should prove to be.

When should the motion be denied and the case remitted to the ordinary forms of trial? The answer is that this should be done wherever there appears to be a bona fide issue of fact presented. The court must determine the existence of such issue from all the facts and circumstances of the case, and no general rule can be set forth as a guide. This is obviously the most serious point for the trial court's decision. In an article incorporating the researches presented to the Connecticut Judicial Council it is proposed to set forth the precedents from the other jurisdictions which consider this problem.[27] It is hoped that this information will be of material assistance to the judges in administering the new rule. It is clear that when the judgment is ended it is a final judgment from which an appeal will lie. The New York courts have held, overruling earlier decisions, that an appeal will lie from the denial of the motion.[28] This is, however, under the New York practice which permits appeals from interlocutory rulings to a considerable extent. Under the Connecticut practice obviously the denial of the motion is not a final judgment from which appeal will lie. Presumably after a trial the matter of the denial of the motion will then be academic and will not present substantial grounds for appeal at that time. This puts an additional obligation upon the trial judges in this state not to defeat the purposes of the new procedure as they may by indiscriminate refusal to consider cases on such motions.

In the article referred to[29] it is proposed to consider other details of the practice as illustrated in other jurisdictions, such as the entry of partial summary judgments, the use of the procedure with reference to counterclaims, and similar problems. It will be found that a considerable body of law has already developed with regard to this procedure.

No procedural machinery can work of itself. Its success will depend upon the way in which it is operated. It is hoped and believed that our judges and our Bar will use this new procedure in the spirit in which it is conceived and that it will prove a most effective means of improving the administration of justice in our state.[30]

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26. Page 298 of 2 Conn. Bar J.

27. The article by Mr. Samenow and the writer referred to in note 10, supra. On the general problem, cf. Roberts v. Donohue, 246 N. Y. 447, 159 N. E. 393 (1927), Curry v. Mackenzie, 239 N. Y. 267, 146 N. E. 375 (1925), Bernstein v. Kritzer, App. Div. 231 N. Y. Supp. 97 (1928), and Clark, Code Pleading, page 385.

28. Lee v. Graubard, note 19, supra, Hongkong & Shanghai Banking Corporation v. Lazard-Godchaux Co., 207 App. Div. 175, 201 N. Y. S. 771 (1923), overruling Dwan v. Massarene, note 13, supra, on this point. So also in United Products Corp. v. Standard Textile P. Co. App. Div. 231 N. Y. Supp. 115 (1928).

29. Note 10, supra.

30. In New York under civil practice rule 107 a somewhat similar procedure is available to a defendant whereby he may raise certain issues of fact or of law by affidavits. See Clark, Code Pleading, 386, 387. Later reform in Connecticut may perhaps take the course of adopting similar provisions.

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A SIGNIFICANT REFERENDUM

The conquest of intelligent lay opinion is a long step towards achieving improvements in the administration of Justice, particularly those which require legislative sanction. When intelligent laymen are interested and convinced, their opinions become a real force making for readier acceptance of sound views by legislative bodies. Principles which they advocate are free from the uninformed criticism that they are urged in the interest of a particular profession.

For these reasons the vote of the National Council of the National Economic League on certain proposals dealing with the administration of Justice, a notice of which appears in the Current Events Department in this issue, is of real significance. Over one thousand members of the Council took part in the referendum by filling out the questionnaire submitted. These members embraced presidents, professors of universities, judges, lawyers, bankers, merchants, manufacturers, farmers, labor leaders, etc. As the judges and lawyers were naturally only a small percentage of the whole body, the members may be taken as representative of intelligent lay opinion all over the country.

The replies to the twenty-two questions submitted show that the conquest of this opinion is far advanced. If one judged solely by the results of the referendum, one might be justified in saying it was complete. Strong indorsement was given to numerous improvements for which the profession has fought and is still fighting. The Judicial Council as a permanent organization for each state, charged with the duty of making a continuous study of the organization, procedure and practice of courts and of making recommendations from time to time to Governor or Legislature, was overwhelmingly approved. Exercise of the rule-making power by the Courts or by a Judicial Council, as opposed to legislative interference in the business, was approved no less emphatically. The American Bar Association's educational standards, both preliminary and legal, received a vote of nearly six to one on the referendum, and the need of a preliminary examination as to character and fitness was almost unanimously recognized.

Marked differences of opinion were shown with regard to a number of proposals; and these, in many cases, represent differences existing in the profession itself. For instance, 645 members voted for an appointive Judiciary and 264 for the elective system. But that those favoring an elective system were aware that certain safeguards were needed is shown by the fact that most of the members professing this view agreed that the election should be by means of a non-partisan, non-political, and separate ballot. The vote in favor of legislation providing for public defenders was fairly close—460 to 306. The members voted, 551 to 364, against requiring the defendant in a criminal case to take the witness stand and submit to examination and cross-examination, but approved the right of the prosecutor to comment on his failure to take the stand by a vote of 512 to 275.

In many instances the referendum showed that intelligent lay opinion is prepared to accept unreservedly various other proposals which have a strong body of legal opinion behind them. Unification of the whole judicial power of the State, vesting it in one organization of which all judicial tribunals shall be branches or departments or divisions, was indorsed by a four to one vote. The members overwhelmingly favored giving the trial judges in State Courts the same power to comment on the weight and sufficiency of the evidence and the credibility of the witnesses as that possessed by the Federal trial judges. Opinion that the defendant in a criminal case should have the right to waive jury trial and be tried by Court was practically unanimous. Verdicts by less than twelve in both civil and criminal cases were overwhelmingly approved. Compul-

sory, all-inclusive Bar organization, with disciplinary powers, subject to judicial review, was favored, nearly three to one. Abolition of the Grand Jury was opposed by a vote of over two to one, but a limitation of the requirement of indictment to the more serious offenses was accepted by a vote of 648 to 105.

Generalizing from the replies, one is justified in saying that the result of the referendum shows a remarkable harmony between the views of intelligent laymen and of legal advocates for improvement in the administration of Justice. Something of this is doubtless due to the efforts which the profession has made in past years to make the general public better acquainted with problems which concern the whole people as well as the profession itself. Perhaps, however, this growing harmony is preeminently due to the fact that the legal profession and the lay world have at last found a common viewpoint and a common language in which to discuss the changes needed. That language is the language of efficiency. The major proposals for improvement which are backed by the best opinion of the Bench and Bar today are essentially proposals by efficiency experts in this special field. They appeal to common-sense principles which are effective in any organized field and which any intelligent layman with an acquaintance with business can readily understand and appreciate.

Business men of all kinds, for instance, have no difficulty whatever in understanding that the men who operate the courts are the men best fitted to determine the details of daily and routine procedure. They have only to try to imagine how they would get along in their special fields if these administrative details were laid down by a legislative body meeting every two years and preoccupied with what it usually regards as more important subjects. They see at once the advantages of such an organization as the Judicial Council and of better technical preparation, because they are essentially business-like proposals. The same may be said as to their reactions to many other questions submitted in the referendum. They are business questions and are easily recognized as such when they are plainly put.

Laying the foundation work always seems the slowest part of the business of erecting any structure—physical, moral or political. But when it is done, and well done, the progress quickens and results become increasingly evident. This referendum gives ground for belief that the foundation work in intelligent public opinion to which the profession has devoted itself so long is progressing well and that the superstructure will soon begin to rise in view.

THE CARAWAY BILL AGAIN

The Caraway bill is again before Congress. It would prevent the federal trial judge from following the present practice of commenting on the weight of the testimony and the credibility of the witnesses. It would thus silence the only impartial voice in the courtroom and leave the conduct of affairs mainly to the paid advocates of both sides. It would deprive the jury of the invaluable aid of an impartial expert in reaching a conclusion.

Five years ago, in commenting on this same indefensible proposal, we said:

"This old common-law power which the federal court preserves in its entirety is a jewel which some states have thrown away. That is no reason why Congress should attempt to throw it away. Nor need we hastily assume, for that matter, that Congress can do it. That is a question which would arise in case the mistaken effort now under way at Washington should result in the passage of the change proposed.

"Those who have studied carefully the administration of Justice in our country are generally agreed that one of the reasons why Justice halts and crime is insolent is the fact that in so many states this old common-law power of the judges has been taken away. One of the main articles in any well-considered plan for making the administration of Justice as efficient as possible must be the restoration of this power to the courts,—if the courts are not prepared to maintain and exercise it on the ground of inherent right. The federal courts stand as a bright example of what this power means and point the way to ultimate and genuine reform.

"Congress is justly solicitous about the public domain. It should be equally solicitous about the tried and approved methods of administering justice in the national courts—for they are a rich domain of even greater importance."

The bill is an example of a familiar tendency to petty regulation carried into the judicial field. There is no demand for it and no excuse for it. Its passage would be a catastrophe.

REVIEW OF RECENT SUPREME COURT DECISIONS

Where Decedent Had Right to Change Beneficiaries in Policies Taken Out on His Own Life, the Amounts Received Therefrom Are Properly Included in Estate for Purpose of Measuring Transfer Tax—Remedies Created by Merchant Marine Act for Death or Injury of Seamen Are Exclusive—Taxable Price Where Tax Imposed Is Percentage of Selling Price of Article Sold—Lien for Attorney's Fees on Mortgaged Property in Hands of Trustee in Bankruptcy—Tennessee Statute Fixing Sale Price of Gasoline Held Invalid—Federal Employer's Liability Act

By Edgar Bronson Tolman*

Taxation—Transfer Tax—Insurance Policy

Provisions of the Revenue Act of 1921 requiring the inclusion of amounts received by the executor and beneficiaries under insurance policies taken out by the decedent on his own life in determining the amount of the estate by which the transfer tax is measured are valid, where the decedent had the right to change the beneficiary. The tax continues to be a transfer or privilege tax under such circumstances and need not be apportioned.

The method of determining the amount of tax is not arbitrary.

Chase National Bank of New York v. United States, Adv. Op. 114, Sup. Ct. Rep. ———

The court of Claims certified two questions to the Supreme Court relating to the constitutionality of provisions in the Revenue Act of 1921 imposing a tax on insurance policies. By § 401 of that Act a tax is imposed on "the transfer of the net estate of every decedent." The gross value of the estate, by § 402 (f) includes "the amount receivable by the executor as insurance under policies taken out by the decedent upon his own life; and to the extent of the excess over $40,000 of the amount receivable by all other beneficiaries as insurance under policies taken out by the decedent upon his own life." The executor is required to pay the tax, and the beneficiaries are liable for a portion of it. The latter are liable to the executor for their proportions if he pays the whole tax.

The tax assessed here included $9,146.76, imposed by reason of including in the estate the proceeds, less the statutory exemption, of three insurance policies totaling $200,000.

The policies named the decedent's wife as beneficiary. Each reserved to the insured the right to change the beneficiary, and the insured paid all the premiums.

The questions certified were:

> Question I: Whether the tax imposed by the final clause of section 402 (f), Revenue Act of 1921, 42 Stat. 278, on life insurance policies payable in terms to beneficiaries "other than the decedent or his estate" is a direct tax on property and void because not apportioned.
>
> Question II: Whether the $9,146.76 tax imposed bears such an unreasonable relation to the subject matter of the tax as to render it void.

The tax was paid as assessed, and on denial of a claim for a refund, this action was brought. The claimant contended that the tax is not an excise or privilege tax, but a direct tax on property, and hence invalid, because not apportioned as required by Art. I, §§2, 9 of the Constitution. It was further urged that the measure of the tax and the methods of securing payment are so arbitrary as to be violative of the due process clause of the Fifth Amendment.

Both of the questions certified were answered in the negative, in an opinion delivered by Mr. Justice Stone. His statement of the question involved and preliminary discussion of it were as follows:

> It is true, as emphasized by plaintiff, that the interest of the beneficiaries in the insurance policies effected by decedent "vested" in them before his death and that the proceeds of the policies came to the beneficiaries not directly from the decedent but from the insurer. But until the moment of death the decedent retained a legal interest in the policies which gave him the power of disposition of them and their proceeds as completely as if he were himself the beneficiary of them. The precise question presented is whether the termination at death of that power and the consequent passing to the designated beneficiaries of all rights under the policies freed of the possibility of its exercise may be the legitimate subject of a transfer tax, as is true of the termination by death of any of the other legal incidents of property through which its use or economic enjoyment may be controlled.
>
> A power in the decedent to surrender and cancel the policies, to pledge them as security for loans and the power to dispose of them and their proceeds for his own benefit during his life which subjects them to the control of a bankrupcy court for the benefit of his creditors, . . . and which may, under local law applicable to the parties here, subject them in part to the payment of his debts, . . . is by no means the least substantial of the legal incidents of ownership, and its termination at his death so as to free the beneficiaries of the policy from the possibility of its exercise would seem to be no less a transfer within the reach of the taxing power than a transfer effected in other ways through death.

Decisions relating to succession taxes were next discussed and the rule there applied was thought analogous and persuasive here. *Saltonstall v. Saltonstall* was especially considered and the following quoted from the opinion there:

> "So long as the privilege of succession has not been fully exercised it may be reached by the tax. . . . And in determining whether it has been so exercised technical distinctions between vested remainders and other interests are of little avail, for the shifting of the economic benefits and burdens of property, which is the subject of a succession tax, may even in the case of a vested remainder be restricted or suspended by other legal devices. A power of appointment reserved by the donor leaves the transfer, as to him, incomplete and subject to tax. . . . The beneficiary's acquisition of the property is equally incomplete whether the power be reserved to the donor or another."

The reasoning there was thought to apply here, as appears from the following:

> That (i. e., the language quoted), it is true, was said of a succession tax, and we are here concerned with a transfer tax. The distinction was there important for it was at least doubtful whether upon the death of the

*Assisted by Mr. James L. Homire.

settlor there was any such termination, as to him, of a power of control over the remainder such as would have been subject to a tax levied exclusively on transfers, since the power was not vested in him alone, but in him and another. . . . But we think that the rule applied in *Saltonstall v. Saltonstall*, supra, to a succession tax is equally applicable to a transfer tax where, as here, the power of disposition is reserved exclusively to the transferor for his own benefit. Such an outstanding power residing exclusively in a donor to recall a gift after it is made is a limitation on the gift which makes it incomplete as to the donor as well as to the donee, and we think that the termination of such a power at death may also be the appropriate subject of a tax upon transfers.

A further objection pressed in opposition to the tax was that it must be deemed a tax not on the transfer, but upon the property, because the beneficiary's interest is transferred from the insurer and not from the decedent. It was urged that in view of this circumstance the tax could not be upheld as a transfer or privilege tax. This interpretation of the term "transfer" was rejected as too narrow.

The petitioner points to no requirement, constitutional or statutory, that the termination of the power of disposition of property by death whereby the transfer of property is completed, which we have said is here the subject of the tax, must be preceded by a transfer directly from the decedent to the recipient of his bounty, of the property subject to the power. And we see no necessity to debate the question whether the policies themselves were so transferred, for we think the power to tax the privilege of transfer at death cannot be controlled by the mere choice of the formalities which may attend the donor's bestowal of benefits on another at death, or of the particular methods by which his purpose is effected, so long as he retains control over those benefits with power to direct their future enjoyment until his death.

The objection based on the Fifth Amendment was disposed of in the following brief discussion:

The objection urged by plaintiff under the second question, that the statutory method of fixing the tax and securing its payment infringes the Fifth Amendment, need not detain us. It is said that both the tax on those who share in the decedent's estate and that paid by the beneficiaries is larger than it otherwise would be if the proceeds of the insurance had not been included in the decedent's gross estate. But the increase in the tax to both is a consequence of including the amount of the policies in the gross estate in determining the net which is made the measure of the graduated transfer tax. The objection amounts to no more than saying that if the transfer of the policies or their proceeds be taxed, they should not be included with the other property of the estate in determining the rate of the tax. As it is the termination of the power of disposition of the policies by decedent at death which operates as an effective transfer and is subjected to the tax, there can be no objection to measuring the tax or fixing its rate by including in the gross estate the value of the policies at the time of death, together with all the other interests of decedent transferred at his death.

The case was argued by Messrs. Dallas S. Townsend and William Marshall Bullitt for Bank and by Mr. Alfred A. Wheat for the United States.

Merchant Marine Act—Effect on Other Remedies

The remedies created by the Merchant Marine Act for the death of or personal injury to a seaman are exclusive and no recovery under state statutory or common law will be allowed to one subject to it.

Northern Coal and Dock Co. v. Strand, Adv. Op. 09; Sup. Ct. Rep. Vol. 49, p. 88.

The petitioner Coal and Dock Company here maintained a dock on Superior Bay, Wisconsin, for unloading coal. It employed some eighteen men to make fast and unload vessels there. One of its employees, Charles Strand, was struck and killed by a clamshell while working on a vessel in the course of his employment.

His widow obtained death benefits from the Industrial Commission of Wisconsin against the employer and the other defendant, an insurance company. It thus found Strand and his employer subject to the State Compensation Act. The state courts upheld the award.

On a writ of certiorari the Supreme Court reversed this in an opinion delivered by MR. JUSTICE MCREYNOLDS. This ruling sustained the contention of the petitioners that the Merchant Marine Act applied exclusively under the circumstances.

In arriving at this conclusion the nature of the tort was first discussed.

Strand's employment contemplated that he should labor both upon the land and the water. When killed he was doing longshore or stevedore work on a vessel lying in navigable waters, according to his undertaking. His employment, so far as it pertained to such work, was maritime; the tort was maritime; and the rights of the parties must be ascertained upon a consideration of the maritime law. . . . Originally, that law afforded no remedy for damages arising from death; but we have held that it might be supplemented by state death statutes which prescribe remedies capable of enforcement in court. . . . We have also held that state statutes providing compensation for employees through commissions might be treated as amending or modifying the maritime law in cases where they concern purely local matters and occasion no interference with the uniformity of such law in its international and interstate relations. . . .

The unloading of a ship is not matter of purely local concern. It has direct relation to commerce and navigation, and uniform rules in respect thereto are essential. The fact that Strand worked for the major portion of the time upon land is unimportant. He was upon the water in pursuit of his maritime duties when the accident occurred.

After summarizing the provisions of the Wisconsin act, attention was directed to the section of the Merchant Marine Act providing that seamen shall have for injuries in their employment the rights and remedies granted in the act applying to injuries to railway employees. Consequently, this led to a review of the authorities dealing with the exclusiveness of such rights and remedies. A consideration of them showed that the federal law applies exclusively in such cases.

The opinion was concluded with the following brief resumé of those decisions:

New York Central v. Winfield, . . . considered the effect of the Federal Employers' Liability Act, . . . upon the former right of employees to recover under the laws of the States. That act provides that every interstate carrier by railroad "shall be liable in damages to any person suffering injury while he is employed by such carrier in such commerce, or, in case of the death of such employee, to his or her personal representative, for the benefit of the surviving widow or husband and children of such employee; and, if none, then of such employee's parents; and, if none, then of the next of kin dependent upon such employee, for such injury or death resulting in whole or in part from the negligence of any of the officers, agents, or employees of such carrier, etc." We held "the act is comprehensive and also exclusive," and denied the right of an employee of an interstate carrier to recover under a State statute even in respect of injuries suffered without fault as to which the Federal Act provides no remedy.

Panama R. R. Company v. Johnson, . . . ruled that Sec. 20 . . ., as amended by the Merchant Marine Act, incorporated the Federal Employers' Liability Act into the maritime law of the United States. . . .

We think it necessarily follows from former decisions that by the Merchant Marine Act—a measure of general application—Congress provided a method under which the widow of Strand might secure damages result-

ing from his death, and that no State statute can provide any other or different one. . . ."

MR. JUSTICE STONE concurred in the result that a seaman would be confined to the statutory remedy.

However, he stated further:

> But I should have found it difficult to say that the present case is controlled by the maritime law and so to suggest that workmen otherwise in the situation of the respondent, but who are not seamen and therefore are not given a remedy by the Jones Act, are excluded from the benefits of a compensation act like that of Wisconsin.

The learned Justice also stated that since the employment here was essentially non-maritime, and since the application of the compensation law is based on a theory of contract, it seemed difficult to hold the federal law exclusive here. He concluded as follows:

> Nor would it seem that resort by an employee only casually working on a ship, through such a non-maritime stipulation, to a state remedy not against the ship or its owner, but against the employer engaged in a non-maritime pursuit is anything more than a local matter or would impair the uniformity of maritime law in its international or interstate relations. . . . Recovery in a state court upon an insurance policy upon the life of a seaman for death occurring on a ship on the high seas while in the performance of his duties would not, I suppose, be deemed to have that effect or be precluded by the admiralty law, even though some of the provisions of the policy were imposed by state statute.

MR. JUSTICE HOLMES and MR. JUSTICE BRANDEIS concurred in MR. JUSTICE STONE'S opinion.

The case was argued by Mr. Charles B. Quarles for petitioners and by Mr. Mortimer Levitan for respondents.

Taxation—Measure of Sales Tax

Where a tax imposed on sales is a percentage of the selling price of the article sold, the taxable price is the sum actually received by the seller; he cannot reduce the percentage by notifying the buyer that he has paid the tax and thereby deduct that amount from what the buyer pays, unless he bills the tax as a separate item.

Lash's Products Co. v. United States, Adv. Op. 171; Sup. Ct. Rep. Vol. 49, p. 100.

The Revenue Act of 1918, by §628, imposed on soft drinks sold by the manufacturer in bottles, a tax equivalent to "10 per centum of the price for which so sold." The taxpayer here paid a tax of 10% of the sum actually received by it for the goods. It had notified its customers that it paid the tax and in a suit to recover certain taxes it contended that in this way it had passed the tax on, and that the taxable price was the sum received less the amount of the tax.

The government contended that the true taxable price was the amount actually paid to the seller. On appeal the Supreme Court affirmed a decision of the Court of Claims sustaining the position of the government.

MR. JUSTICE HOLMES delivered the opinion of the Court, saying:

> The phrase "passed the tax on" is inaccurate, as obviously the tax is laid and remains on the manufacturer and on him alone. . . . The purchaser does not pay the tax. He pays or may pay the seller more for the goods because of the seller's obligation, but that is all. Still the question as to the meaning of the statute remains.
>
> The petitioner supports its position by a regulation of the Commissioner that when the tax is billed as a separate item it is not to be considered as an increase in the sale price. Naturally a delicate treatment of a tax on sales might seek to avoid adding a tax on the amount of the tax. But it is no less natural to avoid niceties and to fix the tax by the actual price received. Congress could do that as properly as it could have added one-tenth to the tax on the price as fixed by the other items determining the charge to the buyer. The price is the total sum paid for the goods. The amount added because of the tax is paid to get the goods and for nothing else. Therefore it is part of the price, and if the statute were taken literally, as there would be no reason for not taking it if it were now passed for the first time, there might be difficulty in accepting the Commissioner's distinction even if the tax were made a separate item of the bill. But if, in view of the history in the Solicitor General's brief, we assume with him that the practice of the Commissioner has been ratified by Congress, we agree with his argument that the petitioner must take the privilege as it is offered. It did not bill its tax as a separate item, and the Commissioner's Regulations notified it that "if the sales price of a taxable beverage is increased to cover the tax, the tax is on such increased sales price" although they purported to make a different rule "when the tax is billed as a separate item." There has been some difference of opinion in the lower Courts but we regard the interpretation of the law as plain.

The case was argued by Mr. A. R. Serven for petitioner and by Solicitor General Mitchell for respondent.

Bankruptcy—Lien for Attorney's Fees

Where the amount of a note includes attorney's fees on collection through an attorney, a mortgage securing such note constitutes a lien for the amount of such fees on the mortgaged property in the hands of a trustee in bankruptcy of one who had assumed payment of them, even though collection through an attorney had not been effected at the time of the adjudication. But where the creditor fails to serve the trustees with the required notice of his election to accelerate the principal and sue, or brings suit solely to increase the claim secured by lien, the claim for such fees will not be allowed against the bankrupt's estate.

Security Mortgage Co. v. Powers, Adv. Op. 94; Sup. Ct. Rep. Vol. 49, p. 84.

In a district court in Florida, the Florida Furniture Company was adjudged bankrupt. An ancillary receiver was appointed to take charge of certain real estate owned by it in Georgia. This real estate was subject to a loan deed securing notes of the Hanson Motor Company which the Furniture Company had agreed to pay. The notes were held by Security Mortgage Company.

The trustee in bankruptcy sought leave to sell the land free from the lien. On an order to show cause served on the Mortgage Company, such leave was granted without opposition by the latter, but the rights of the lien creditor were preserved against the proceeds of the sale. The Mortgage Company became the purchaser at a price in excess of all liens. It asked to be allowed as a credit against the purchase price the sum of $9,442.40 for attorney's fees.

The notes in question included a clause allowing attorney's fees at 10% if collected by law or through an attorney.

After adjudication of bankruptcy an interest note matured and was not paid. On this default, but before leave to sell was granted, the Mortgage Company notified the Hanson Company of its election to declare the principal due, and that it intended to bring suit and to claim attorney's fees in a local court unless the indebtedness was paid. Later, such suit was brought but neither the bankrupt, trustee nor receiver was joined nor so far as appeared was any of them notified of the suit. Judgment was entered for the amount of the debt and attorney's fees, and it was declared a lien on the property.

In the federal court the referee allowed the attorney's fees as a credit against the purchase price, but the district judge disallowed this. On a stipulation that a certificate contained all facts necessary for understanding the issue an appeal was taken to the Circuit

Court of Appeals, which affirmed the judgment disallowing the credit. Certiorari was taken to the Sup. Ct.

Under §67 of the Bankruptcy Act the trustee takes property subject to liens in existence when the bankruptcy proceedings are instituted. The trustee contended that here there was no valid lien at that time for attorney's fees.

A Georgia statute makes an agreement to pay attorney's fees void in such cases unless a prescribed notice is served on the defendant. In compliance with this, notice was duly served on the Hanson Company. The Mortgage Company contended that the lien for fees attached to the proceeds of the sale; the trustee did not question the personal liability of the Hanson Company, but did object to enforcing liability against the proceeds.

In an opinion delivered by MR. JUSTICE BRANDEIS, the case was fully considered and reversed for further findings necessary to a correct determination of the issues.

Various contentions of the trustee were discussed, and all but two were rejected. The first was that the claim here was contingent at the time of the adjudication, and hence not provable. With reference to this the learned Justice said:

> The lien was not inchoate at the time of the adjudication. It had already become perfect when the principal note and the loan deed securing it were given. Property subject to a lien to secure a liability still contingent at the time of bankruptcy is not discharged from the lien by the adjudication. The secured obligation survives; and if it is that of a third person is usually unaffected by the bankruptcy. When by the happening of the event the contingent liability becomes absolute, the lien becomes enforceable, though this occurs after the adjudication.

The opinion continued:

> The trustee contends that allowance of the credit is barred by §67d, because the liability for attorney's fees not having become absolute until after the adjudication, is excluded by the provision which allows outstanding liens "to the extent of such present consideration only." The contention has support in *In re Mobile Chair Co.* . . . But it was rejected, and we think properly, in *In re Rosenblatt.* * * * The contingent obligation to pay attorney's fees was a part of the original transaction. The consideration for the lien was not the attorney's services, but the $90,000 advanced by the Mortgage Company; and this was a present consideration.

The third contention urged was that the contract was void by local law until the statutory condition had been complied with and that consequently the claim was not supported by a valid contract at the time of adjudication. This was advanced on the theory that the bankrupt's estate could not be affected by a subsequent validation equivalent to a new contract. This was rejected with the following comment with reference to the Georgia statute:

> The language of the statute lends some color to the trustee's contention. No case in a court of the State has been called to our attention in which consideration of this contention was had. Those which discuss the significance of the word "void," as used in this section, throw little light upon it. Despite the language employed, we are of opinion that the Legislature did not contemplate validation of a void contract, but merely added a statutory condition to the written contract to pay attorney's fees.

The other contentions made were considered sound if supported by the facts, and since the facts as to them were not disclosed the case was remanded for further findings. The first of these contentions was that the Mortgage Company had not notified the trustee. The merit of this was explained in these terms:

> If it failed to give the trustee notice of the election and of the intention to bring suit, we think that it is not entitled to the credit for attorney's fees. For, if he had been notified, the trustee might have arranged to pay the note on or before the return day of the suit against the Hanson Company. The purpose of the Georgia statute is clear. It is to protect the debtor, in spite of default, from any liability for attorney's fees, unless he fails to pay after the lapse of the ten days from receiving notice of intention to sue and such further time as must intervene between the commencement of the suit and the return day. . . . The Legislature cannot have intended that the creditor should be able to impose the additional liability for attorney's fees, without giving to the real debtor the notice and opportunity to pay which the statute contemplated that a debtor should have. This objection also involves primarily a question of local law; and no decision directly in point has been found. But decisions applying the Georgia statute to somewhat similar situations support this conclusion.

Finally, the trustee contended that the Hanson Company was without assets at the commencement of the suit against it and that the suit was brought merely to increase by the amount of the attorney's fees, the claim payable in bankruptcy under the lien. After observing in this connection that, although under the local law, mere insolvency does not bar a judgment for attorney's fees, the learned Justice said:

> The case at bar presents, however, additional facts. It is asserted that the suit against the Hanson Company was brought, not for the purpose of collecting the debt, but solely for the purpose of enhancing the amount which was obtainable without suit, through the lien upon the proceeds of the property. If this is true, the statutory provision designed for the protection of the debtor was employed solely as a means of oppression. We will not assume, in the absence of a decision by a Georgia court, that the Legislature intended to permit such use.

Consequently, the case was remanded for finding further facts.

The case was argued by Mr. John E. Benton for the petitioner and by Mr. Walter S. Dillon for the respondent.

Statutes—Fixing Price of Gasoline

The Tennessee Statute providing for the fixing of prices at which gasoline may be sold in that State is invalid as an arbitrary deprivation of property under the Fourteenth Amendment.

Williams v. Standard Oil Co., Adv. Op. 141; Sup. Ct. Rep. ———.

In 1927 the State of Tennessee adopted a statute designed to fix the prices at which gasoline might be sold there. It set up a Division of Motors and Motor Fuels to collect and record data concerning the business, freight rates, wholesale and retail prices, and costs. This information was for the use of the Commissioner of Finance and Taxation in fixing prices. To procure a permit a dealer must submit to the Commissioner a schedule of proposed prices, and if they are not approved by him the dealer may have his decision judicially reviewed.

The decision here involved suits brought by two foreign corporations which had been engaged in the business of selling gasoline in Tennessee for a long time prior to the passage of the statute. They sought to enjoin the appropriate state officers from enforcing the statute and from instituting criminal proceedings sanctioned by it.

The chief ground relied upon by the corporations was that the legislature was without power to fix the price of gasoline, because such price-fixing would de-

prive the vendors of their property without due process of law.

After a hearing before three judges a temporary injunction was granted and the state officers appealed. On appeal the decrees were affirmed by the Supreme Court in an opinion delivered by MR. JUSTICE SUTHERLAND. The public interest requisite to justify price-fixing was found lacking here.

The import of *Tyson & Brother v. Banton* and other recent cases dealing with price-fixing was explained briefly as follows:

> It is settled by recent decisions of this Court that a State legislature is without constitutional power to fix prices at which commodities may be sold, services rendered, or property used, unless the business or property involved is "affected with a public interest." . . . Nothing is gained by reiterating the statement that the phrase is indefinite. By repeated decisions of this Court, beginning with *Munn v. Illinois*, . . . that phrase, however it may be characterized, has become the established test by which the legislative power to fix prices of commodities, use of property, or services, must be measured. As applied in particular instances, its meaning may be considered both from an affirmative and a negative point of view. Affirmatively, it means that a business or property, in order to be affected with a public interest, must be such or be so employed as to justify the conclusion that it has been devoted to a public use and its use thereby in effect granted to the public. . . . Negatively, it does not mean that a business is affected with a public interest merely because it is large or because the public are warranted in having a feeling of concern in respect of its maintenance. . . . The meaning and application of the phrase are examined at length in the Tyson case, and we see no reason for restating what is there said.
>
> In support of the act under review it is urged that gasoline is of widespread use; that enormous quantities of it are sold in the State of Tennessee; and that it has become necessary and indispensable in carrying on commercial and other activities within the State. But we are here concerned with the character of the business, not with its size or the extent to which the commodity is used. Gasoline is one of the ordinary commodities of trade, differing, so far as the question here is affected, in no essential respect from a great variety of other articles commonly bought and sold by merchants and private dealers in the country. The decisions referred to above make it perfectly clear that the business of dealing in such articles, irrespective of its extent, does not come within the phrase "affected with a public interest." Those decisions control the present case.

Several other questions were discussed. The contention that the act was justified because the corporations here monopolized the gasoline industry in Tennessee was found without support.

The point that foreign corporations may not carry on business in the state, without complying with prescribed conditions, was rejected also. In answer to this it was pointed out that a state may not impose conditions on foreign corporations requiring the relinquishment of rights guaranteed by the Constitution.

Finally, the opinion dealt with the contention that the provisions of the statute, other than that fixing prices, should be upheld, because they are separable. But on examination of the whole act it apeared that the other provisions were so bound up with price-fixing that they could not be sustained.

MR. JUSTICE BRANDEIS and MR. JUSTICE STONE concurred in the result. MR. JUSTICE HOLMES dissented.

The case was argued by Messrs. Charles T. Cates and James J. Lynch for appellants and by Messrs. John W. Davis and H. Dent Minor for appellee in No. 64; by Mr. John B. Keeble for appellee in No. 65.

Federal Employer's Liability Act—Cause of Injury

Under the Federal Employer's Liability Act, the death of a conductor in a collision will not be held to have resulted in whole or in part from the negligence of other employees, where the collision resulted from the conductor's direction to his train to proceed, in violation of a standing order, even though other employees carelessly failed to prevent the collision.

Unadilla Valley Railway Co. v. Caldine, Adv. Op. 102; Sup. Ct. Rep. Vol. 49, p. 91.

The action here was brought by the administrator of Harold Caldine to recover damages for the latter's death, under the Federal Employer's Liability Act. The sole question was whether his death resulted in whole or in part from the negligence of any other employees of the carrier in whose employ Caldine was engaged, within the meaning of the statute.

The facts found were these: Caldine was conductor of train No. 2 passing through Bridgewater on a single track. According to a printed order given him he was to pass train No. 15 at Bridgewater Yard. No. 15 was to take a siding there to let No. 2 pass. This order was permanent unless countermanded by a written order from the superintendent and it was not countermanded here. Instead of waiting to pass No. 15 in the yard as required, Caldine directed his train to proceed. Consequently a little beyond the proper stopping place, No. 2 collided with No. 15, which was rightly proceeding towards the yard.

The facts relied upon to show negligence of other employees causing the collision in part were as follows: The conductor of No. 15 generally, or when a little late, at a point about two miles from Bridgewater would telephone the Bridgewater agent that he was coming. He did so in this case. The agent there said he told the motorman of No. 2, but the latter denied it. In any case Caldine did not receive the message.

The administrator contended that the failure of the motorman to inform Caldine, as well as his obeying the order to start, if he knew that No. 15 was coming,—as the jury might have found,—constituted negligence of other employees to which the injury was due in part.

The New York Court of Appeals had affirmed a judgment for the administrator. On a writ of certiorari the Supreme Court reversed this in an opinion delivered by MR. JUSTICE HOLMES. After stating the facts he said:

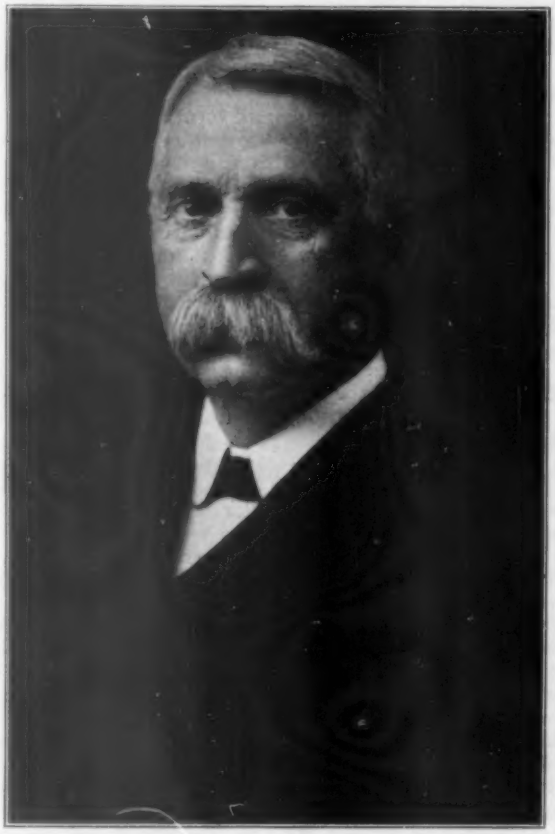
> The phrase of the statute "resulting in whole or in part," admits of some latitude of interpretation and is likely to be given somewhat different meanings by different readers. Certainly the relation between the parties is to be taken into account. It seems to us that Caldine or one who stands in his shoes is not entitled as against the railroad company that employed him to say that the collisioin was due to anyone but himself. He was in command. He expected to be obeyed and he was obeyed as mechanically as if his pulling the bell had itself started the train. In our opinion he cannot be heard to say that his subordinate ought not to have done what he ordered. He cannot hold the company liable for a disaster that followed disobedience of a rule intended to prevent it, when the disobedience was brought about and intended to be brought about by his own acts. . . .
>
> Still considering the case as between the petitioner and Caldine, it seems to us even less possible to say that

(Continued on page 97)

FEDERAL JUDGE LEAVES $100,000 TO ASSOCIATION

Late Judge Erskine M. Ross, of the Court of Appeals for the Ninth Circuit, Makes Bequest and Directs That Income of Fund Be Used to Provide Prizes for Best Discussion of Subject to Be Announced Each Year at Annual Meeting of Association — Wide Humanitarian Interests Revealed in Will—Something of the Life and Character of Testator

A BEQUEST of $100,000 to the American Bar Association is contained in the will of the late Judge Erskine M. Ross, of Los Angeles, California who died in that city on December 10, 1928, at the age of eighty-four. The specific purpose for which it was given is set forth in the eleventh paragraph of the will as follows: "I give, devise and bequeath out of my said estate to the American Bar Association the sum of one hundred thousand dollars to be by it safely invested, the annual income of which is to be offered and paid as a prize for the best discussion of a subject to be by it suggested for discussion at its preceding annual meeting."



ERSKINE M. ROSS

The will as a whole is a remarkable document, showing the wide range of the interests and sympathies of its maker. Some wills are merely a business-like disposition of an estate. Others are more than that. They are also a sort of last message to the world, a partial summing up of the conclusions of a life-time, a final revelation of character. Judge Ross's will was of the latter kind. Family affection, deep religious feeling, wide humanitarian sympathies, love for his profession, and the ineradicable state pride of the former Virginian, no matter where he may fix his home and how loyal he may be to the state of his adoption, are all revealed in this document. It begins with the old formula, "In the name of God Amen!"—which, like a written prayer, is merely formal with those who use it formally, but which may also be the vehicle of real feeling. The contents of the whole will show that the expression was the keynote of the document and not merely a familiar opening phrase.

Judge Ross was on the Federal Bench for over forty years, and was a member of the U. S. Circuit Court of Appeals for the Ninth Circuit at the time of his death. Previous to beginning service on the national tribunals, he was for several years a member of the Supreme Court of California, being elected Justice for a three year term in 1879, at the first election under the present state constitution and re-elected thereafter for a twelve year term. In 1886 he resigned to accept from President Cleveland an appointment as U. S. District Judge in January, 1887. In February, 1895, he was appointed U. S. Circuit Judge. He declined to avail himself of the privilege of retirement at the age of seventy, and remained on the bench until his death. His more active service was ended in 1925, although after that date he remained "on call" and acted several times during the past three years.

On the occasion of his partial withdrawal from regular work on the bench of the U. S. Circuit Court of Appeals for the Ninth Circuit in 1925, President Coolidge wrote him the following letter:

"It is now approaching the end of the half-century since you were called to the Federal bench. During that long period your performance of many and difficult duties has been marked by an ability, courage and determination which have repeatedly won the highest testimonies.

"It has been your fortune to confront on different occasions conditions which required in the discharge of your duties, the highest qualities of learning, wisdom, moderation and great firmness. In these you have never failed, but rather have repeatedly demonstrated a particularly exalted character and thorough-going realization of the place which the judiciary must occupy under our system of government.

"I wish you to know of my regret that your

service is to be terminated and of my confidence that your record will long stand as a memorial to a just and fearless and able judge."

Judge Ross was born in Culpepper County, Virginia, June 30, 1845, the son of William Buckner Ross and Elizabeth Mayo Ross. He was educated at the Virginia Military Institute and joined the ranks of the Confederate Army along with his classmates. He was only 17 years of age at the start of his military service, but survived the war unwounded and returned to the institute to graduate in 1865. Two years later he went to California by steamer. From 1868 he was a resident and leader in Los Angeles. He married Ynez Bettis in 1874 in Los Angeles. Judge Ross studied law in the office of his uncle, Cameron E. Thom, being admitted to the bar by the old District Court in 1869, and later in 1875 by the California Supreme Court. He soon became one of the leaders at the bar and in the development of the growing community. At the time of his death he was one of the outstanding figures in Southern California.

Intimate and interesting details in the life of this unusual man are contained in the following paragraphs, written by one who knew him well for many years.

"He always worked hard; seven-thirty in the morning was his usual arriving time, and while United States District Judge, engaged more or less constantly in trial work, it was his invariable custom to familiarize himself thoroughly with the pleadings in matters about to be brought on for trial. This was one of the strongest contributing factors to the remarkable facility with which he expedited trial work. Any of the older members of the bar of Los Angeles will recall, not only the expedition, but the thoroughness with which Judge Ross dispatched business—no time was lost in proving immaterial or formal issues.

"He usually wrote in longhand, at least a rough draft of opinions to be rendered, one of his expressions being that he could always think more clearly through a pen point. This was accountable for his economy of words. That prolixity which comes from dictation was singularly absent in his opinions. Even in conversation he was extremely pointed, and usually brief.

"The following incident is characteristic: The day following the admission to practice of a young man whom he knew, he called him to his chambers and asked what his intentions were. Being told that he hoped to practice law when enough money was available to pay office rent and buy a few books, he shook his head and said he should resign his job at once, and start in, because, 'It's like standing before a tank of cold water; the longer you look at it the colder it gets.' While this seemed an extremely harsh judgment at the time, the young man realized many times afterwards the real kindness and sound judgment which prompted it, evidenced by his references thereto during the later years.

"He was utterly oblivious of any considerations of favoritism, either to lawyers or litigants. On one occasion four of the most distinguished members of the bar of Soutern California were trying an important lawsuit before him. Something occurred which not only disturbed the decorum of the courtroom, but embarrassed a witness, somewhat to the amusement of the gentlemen of the bar and the audience. A recurrence thereof brought from the judge a stern reminder that respect for both the court and the witness would require severe punishment to the persons responsible, should there be a repetition of the offense. Needless to say, it was not repeated.

"In 1894 the newspapers announced that the American Railway Union, because of the refusal of the railroads of the country to violate their contracts with reference to Pullman cars, intended to paralyze railroad transportation, including, of course, interstate commerce and conveyance of the mails. Immediately on his arrival at the office that morning, Judge Ross dictated memorandum for instructions to the Grand Jury covering the law concerning interference with the mails and interstate commerce, calling attention to the newspaper announcement, and to the statement that certain local officials of the American Railway Union were promoting the unlawful purpose, and an investigation, with such action as the facts might warrant, was directed. Indictments were returned against the local leaders, who were convicted and sentenced to eighteen months' imprisonment. The case was ultimately affirmed by the Supreme Court of the United States.

"Concurrently with his instructions to the Grand Jury, Judge Ross called attention of the United States Attorney to the threatened interference with commerce and the transportation of the mails, including the effect thereof upon the Atlantic and Pacific Railroad, then, if I remember correctly, in the hands of Federal Court Receivers. The result was the filing of a bill on behalf of the United States for an injunction, the issuance of restraining orders directed to various officials of the American Railway Union, from Debs down, including all local leaders and a vast number of individual members of the Union. The writs were placed in the hands of special deputy marshals, who were dispatched immediately to all points on the various railroads in Southern California, and the papers were promptly served. To the credit of the railway men, it is to be said that the disobediences of these orders were very few indeed. The injunction was telegraphed to Chicago and served upon Mr. Debs. Like proceedings instituted in other districts resulted in the famous decision of the Supreme Court in the Debs case.

"While Judge Ross was serving on the Supreme bench of California the then powerful 'blind boss,' Buckley, attempted to influence the Supreme Court, and proceedings were instituted against him for contempt, which the majority of the court joined in quashing. Judge Ross was a Democrat; Buckley was the Democratic boss, and all-powerful in state affairs. Judge Ross vigorously dissented, denouncing Buckley's conduct as corrupt and criminal, declaring that if permitted to go unpunished, it would seriously reflect upon the administration of justice. While Buckley escaped judicial punishment, this characterization of his conduct was one of the prime contributing causes to his downfall.

"Resigning from the Supreme bench shortly after the above occurrence, Judge Ross entered the practice in association with Stephen M. White. Not long thereafter the District judgeship was created for Southern California, and President Cleveland appointed Judge Ross to fill the place. In

1895, during President Cleveland's second term, Judge Ross was promoted to the Circuit judgeship, his work thereafter being largely confined to the Circuit Court of Appeals for the Ninth Circuit, a position which he occupied at the time of his death.

"During Judge Ross' service as District Judge, the famous 'Itapa,' Trumbull and related cases growing out of the Balmaceda Revolution in Chile were tried before him, in which our present revered and doubly distinguished Chief Justice, as Solicitor General of the United States, represented the Government. I trust no confidence is abused in the statement that thenceforward there continued between these two unusual men that mutual regard and esteem which their respective characters would naturally inspire.

"Judge Ross was regarded by some people as cold and austere. On the contrary, he was kindness and generosity personified. His solicitude for the health and welfare of his friends, and those in whom they were deeply concerned, was constant and intense. No good fortune came to any of them which did not give him the utmost satisfaction, no misfortune which did not cause corresponding concern and regret.

"His reverence for and profound knowledge of the law, and particularly the Constitution, are too well known to require more than passing comment —they are demonstrated by his bequest of One Hundred Thousand Dollars to the American Bar Association in furtherance of a better public understanding of our Government and the responsibilities of its citizens."

In addition to making generous provision for relatives, Judge Ross left bequests to the following institutions: $50,000 to the Memorial Home for girls in Richmond, Va.; Alpha Tau Omega Fraternity (of which he was one of the founders), $5,000; American Bar Association, $100,000; Childrens' Hospital of Los Angeles, $20,000; Orthopoedic School-Hospital for Crippled Children of Los Angeles, $5,000; The Pilgrimage Play organization of Los Angeles, $20,000; the remainder of the estate to St. Paul's Protestant Episcopal Church of Richmond, Va., St. Paul's Protestant Episcopal Church of Los Angeles, and Grace Protestant Episcopal Church of San Francisco, Cal. "I am aware," he says, "that this last mentioned bequest might be subject to legal objection, but I feel sure that it will not be in any way contested or objected to by my said son, who is my sole legal heir."

"PRESENT-DAY LAW SCHOOLS IN UNITED STATES AND CANADA"*

Consideration of Bulletin Prepared for the Carnegie Foundation for Advancement of Teaching by Alfred Zantsinger Reed, Author of the Remarkable Monograph on "Training for the Public Profession of the Law," Issued in 1921 by Same Institution

By John B. Sanborn

Secretary of Council of Legal Education and Admission to Bar of American Bar Association

IN 1921, the Carnegie Foundation for the Advancement of Teaching issued a bulletin by Alfred Z. Reed,[1] which gave an historical and critical discussion of legal education in the United States down to 1890. This has been now followed by a bulletin by the same author on the law schools of this country approximately as of 1927-28, with an account of legal education in Canada and Newfoundland.[2]

The preface to the present bulletin is not by the author but by President Pritchett of the Foundation. Nearly concealed, however, in the midst of a chapter on summer sessions, we find Mr. Reed's own statement of his purpose: "The object of this volume is not, however, to anticipate the verdicts of history or to distribute praise and blame. It is to state existing facts and tendencies as fairly as possible, to the end that those charged with direct responsibility for training our future lawyers may be in some small measure aided in their task of perfecting existing institutions." In my opinion Mr. Reed has attained his objective. There is no reason, however, to retain the modifier of the word "measure" in his statement.

In accord with this purpose, by far the greatest portion of the bulletin is given to the presentation of facts. These have been so closely packed into the 393 pages (exclusive of 167 pages in the Appendix), other than the part devoted to Canada and Newfoundland, that one cannot present a summary of them within the space allotted to this review.

Part I covers the organization of legal education. There is, of course, no formal supervision over law schools or other methods of training for the bar. As Mr. Reed points out, anyone may start a law school. Such professional supervision as exists comes from the American Bar Association through its Council on Legal Education and Admissions to the Bar, the state and local Bar Associations, especially through the Conference of Bar Association Delegates, and the Association of American Law Schools. "At the cost of an enormous

*Bulletin No. 21. The Carnegie Foundation for the Advancement of Teaching, 522 Fifth Avenue, New York City, 1928.

1. Training for the Public Profession of the Law, Carnegie Foundation, Bulletin No. 15, 1921.

2. Both of these bulletins can be obtained without charge from the Carnegie Foundation, 522 Fifth Avenue, New York. Each should be in the hands of everyone interested in legal education and bar admissions.

amount of effort, the disadvantages inherent in the existence of mutually independent groups of reformers have been obviated to a considerable extent. . . . There has finally been formulated a definite programme, which, because of the combination of influential and worthy elements that support it, must be respectfully considered by the authorities of all law schools, and by the legislatures, courts, and boards that are responsible for the admission of applicants to the practice of the law."

Another important influence upon legal education exists in the requirements for admission to the bar. Mr. Reed considers those features of the admission systems which bear most directly upon law schools. He notes that since the recommendations of the American Bar Association in 1921, many jurisdictions have strengthened their admission requirements but that none has followed these recommendations in their entirety, the two states which come nearest being, in his opinion, West Virginia and Wisconsin.

There is an interesting discussion of law degrees which Mr. Reed properly considers of limited significance. However, in line with his advocacy in this and his previous bulletin of selective bar associations, he suggests the possible development of an association of lawyers, membership in which would connote educational attainments and from which titles corresponding to degrees would develop.

As to the structure of law schools, Mr. Reed notes that one hundred and eleven schools, or about two-thirds of the total, are connected, at least nominally, with a college of liberal arts. Since 1918 the Association of American Law Schools has not contained any school not connected with a college or university. It is also true that the approved list of the American Bar Association contains no such school.

He has no figures as to the financial resources of the various schools, but has an interesting classification of colleges or universities maintaining or associated with law schools classified as to income other than that derived from use of plant. This serves to emphasize his idea as to the diversity between law schools for the income of the university reporting the largest income exceeds the aggregate income of 64 other institutions maintaining law schools and the combined income of 11 such universities exceeds that of the remaining 99.

He calls attention to the condemnation both by the Washington Conference and the Association of American Law Schools, of schools operated as "commercial enterprises," but very properly points out, "Yet from the point of view of their graduates, who are misled into believing themselves to be competently trained when they are not, and from the point of view of the community that suffers because these same graduates are permitted to practice law, it makes little difference whether the inordinate financial profits of the law school go to a private promoter or to a struggling college or Y. M. C. A." His counter suggestion is: "That a law school, in order to be approved by the American Bar Association, or to be admitted as a member of the Association of American Law Schools, must enjoy all the income derived from its own students, and also an additional income of a certain specified amount, derived from other sources. A further recommendation that the controlling authority must be a college or genuine university might then be appropriately made, for the purpose of ensuring a proper emphasis upon general education in the training of the student."

Having considered the standardizing forces, he notes that three features have received especial attention: the length of the course, the time of the day at which sessions are held, and the entrance requirements. The first and last of these can, in his opinion, well be treated together as covering the number of years spent by the student in preparing for the bar.

Although the time element may be over-emphasized, yet as Mr. Reed says: "The relative amount of time that the students of two law schools spend (outside as well as inside the classroom) in securing their degree fairly measures the relative amount of profitable intellectual activity that would be displayed, in the two schools, under ideal conditions." He also seems quite correct in considering the time required to prepare for the law school, the time spent in the school, and the time devoted to outside interests, as only phases of the larger aspect.

Ignoring the few schools which now offer a course of less than three years, the law schools may be grouped as full-time (seventy-six), part-time (seventy), and mixed (twenty), with an attendance in each group about equal. Of the full time schools fifty-six require five academic years (the A. B. A. minimum), fourteen require more and six require less.

On the subjects of faculty and curriculum, the standardizing influences have been least at work. Neither the American Bar Association nor the Association of American Law Schools has any requirement as to subjects taught in law schools and only a minimum as to teachers is laid down. Bar admission requirements as to subjects have no real effect on law school curricula. Only a few schools attempt to specify any subjects which must be included in a pre-legal course.

In the absence of any regulation, seventeen full time schools offer no elective work, sixteen offer very little, thirty give the equivalent of from one to one and one-half years additional, and twelve offer subjects which it would take their students from five to six years to cover.

Most full time schools do not require that a regular faculty member teach more than eight hours a week. There is, however, no uniform ratio between the number of teachers and faculty.

Part-time schools either offer less work than full-time schools or are, in Mr. Reed's opinion, forced to so increase their class room hours as to decrease the effectiveness of their work. This leads to the conclusion that "however greatly part-time schools may be improved in quality, their degree must always be quantitively inferior to that conferred by full-time institutions that operate on an equally high plane. It cannot be made to represent so large an amount of education, measured in terms of time fruitfully expended by the student both within and without the classroom. It follows that if they are not to be inferior to good full-time law schools as regards the success with which they achieve their objective, the objective itself must be made to differ."

I have attempted to give a very brief and inadequate account of the factual side of Mr. Reed's work as it relates to law schools of the United

States. Anyone who discusses present day legal education or standards of admission to the bar must use it, and will find it a rich mine of accurate information. Already I have known diverse conclusions drawn from the facts presented, and Mr. Reed would, of course, say quite correctly, that this is what would please him most.

What is Mr. Reed trying to prove by those 393 pages of facts? Up to this point in the bulletin, he has given little indication of his thesis, if he has one. Perhaps he is not trying to prove anything. There is one conclusion, however, which Mr. Reed offers in his final chapter. It touches only one of the many questions which can be raised regarding legal education in this country, but it is so important that the entire space available for this review, and much more, could very well have been devoted to a discussion of it. To have done so, would, I think, have given disproportionate treatment to one chapter out of twenty-two. I can, therefore, only state this conclusion and express in brief terms my disagreement with it.

As developed in Mr. Reed's earlier bulletin, Training for the Public Profession of the Law, the legal profession in this country has a dual function. It furnishes advisors and advocates for clients. It also affords, much more than any other profession or activity, the avenue to public office. Standards for legal education and admission to the bar must, therefore, not be so high as to exclude from the profession any class in the community. Or to be more specific such standards which would prevent one who must earn his living while preparing for the bar could not be justified because of the public side of the profession, although they might be unobjectionable were only the ability of the lawyer to serve his client involved.

The Root Committee recognized this and offered as a solution the raising of the standards of the part-time law school to a substantial parity with the standard full-time school. Mr. Reed is convinced that this cannot be done. Comparing the first group of full-time schools with the second group of part-time schools, he says: "By no conceivable extension or rearrangement of their curriculum can this second group successfully duplicate the activities of the first."

The young man, or young woman, who cannot afford to devote his or her entire time to the study of the law, who must earn a living while the legal education is being obtained, must have a different training and be content to practice in a special field. Only in this way Mr. Reed asserts can we reconcile the conflict between the public and private aspects of the legal profession.

I am stating this more flatly than Mr. Reed does. It is fairer to him to refer to it, as he does, "not as a dogma, backed by authority, but as a suggestion that perhaps merits serious consideration."

In a very brief reply to the suggestion I can only say that I am not convinced, and what is much more important, I do not think that any appreciable proportion of the bar are convinced, that our experience is sufficient to justify the conclusion that the plan of the Root Committee to bring part-time schools up to the standards recommended by the committee is impracticable. The report of that committee was adopted by the American Bar Association in 1921 and approved by the Washington Conference in 1922. The first list of approved schools was issued by the Council in November, 1923, and contained thirty-nine schools which then complied with the A. B. A. standards, none of which gave any part-time work. The present list contains sixty-five schools of which six give part-time work. There is no doubt that there is a great difference between schools on this list, but have we enough experience to say that enough part-time schools cannot attain the A. B. A. standards to take care of the public side of the profession?

Even assuming that part-time schools cannot attain the standards of full-time schools, there is also, I am sure, an equal, and probably greater lack of conviction as to the possibility of carving out of the work of the practitioner a field which would accomplish what Mr. Reed's suggestion requires. It must afford scope for professional activity and financial rewards. It must not be on such an appreciably different plane as to impair the opportunities for political preferment of those who practice in it. It must be one for which part-time schools can give adequate preparation.

Then there is the doubt, which a lawyer may express, whether the legal profession will in the future have that position in public affairs which will require that lawyers, more than doctors or engineers: "ought to be thoroughly competent to render public service; and, second, that they ought to represent, in not grossly unequal proportions, the varying social groups and economic levels of the community that they serve."

Mr. Reed suggests that some day scholars and leading practitioners will study the problem and that "they will ask, first, whether there is any valid answer to the argument that a special field of legal practice, including political or semi-political activities, may be carved out for those who have to support themselves during their student days; and if they find no answer, they will take at least preliminary steps to define that field in such a way that it shall be on the one hand sufficiently large to give this element genuine representation in the administration of the law, and on the other hand sufficiently restricted to be adequately covered, within a reasonable number of years, in a part-time course or school."

I think that there is a valid answer to the argument, but I commend to all who study this problem, or any other in the field of legal education, the careful study of Mr. Reed's work.

Madison, Wisconsin.

Review of Supreme Court Decisions

(Continued from page 92)

the collision resulted in part from the failure to inform Caldine of the telephone from train No. 15. A failure to stop a man from doing what he knows that he ought not to do, hardly can be called a cause of his act. Caldine had a plain duty and he knew it. The message would only have given him another motive for obeying the rule that he was bound to obey. There was some intimation in the argument for the respondent that the rule had been abrogated. The courts below assumed that it was in force and we see no reason for doubting that their assumption was correct.

The case was argued by Mr. H. Prescott Gatley for petitioner and by Mr. David F. Lee for respondent.

CURRENT LEGAL LITERATURE

A Department Devoted to Recent Books in Law and Neighboring Fields and to Brief Mention of Interesting and Significant Contributions Appearing in the Current Legal Periodicals

Among Recent Books

THE British Year Book of International Law, Ninth Year of Issue. New York: Oxford University Press (American Branch), 1928. Pp. vi, 248. $5.50. The British Year Book of International Law, published by the Royal Institute of International Affairs, has acquired a recognized position in the literature of international law. That for 1928 follows the general arrangement and content of those of previous years. The well known members of the Editorial Committee, Sir John Fischer Williams, Professor A. Pearce Higgins, Professor J. L. Brierly, Dr. Arnold D. McNair, and others, contribute articles to this issue, as they have done in the past. Twenty-three pages are devoted to notes on such subjects as the Annual Digest of Public International Law Cases; the Progress of Codification in 1927; The Hague Conventions and the Nullity of Arbitral Awards; The Legal Remedy in Cases of Excess of Jurisdiction; Territorial Limits in the Bristol Channel; the Principle of "Personal" Law; Arbitration and Conciliation; Return of Alien Enemy Property by the United States; and The Case of "The Lotus."

There are summary statements of the judgments, opinions and awards of international tribunals and of national tribunals involving points of international law during 1927; brief reviews of some of the important books of the year on subjects of international law or international relations, a bibliography of the year, and a brief summary of events.

In the leading article, Sir John Fischer Williams continues, under the title "International Law and the Property of Aliens," a discussion of the subject which was dealt with by Mr. Fachiri in the Year Book for 1925, under the title of "Expropriation and International Law," inspired thereto by the questions raised in the dispute between Hungary and Roumania as to the liability of Roumania to Hungary for losses suffered by the Hungarians optants through the expropriation of rural lands in Transylvania, and by the discussion between Mexico and the United States as to the liability of the former for losses of American residents in Mexico. He directs his discussion to the question whether or not, apart from any special terms imposed by concession or by treaty, there exists a general rule to the effect that if a state expropriates the property of an alien without the payment of full compensation, it commits a wrong, of which the state of the alien affected is entitled to complain, even if the measure of expropriation applies indiscriminately to nationals and to aliens. He maintains the negative of this proposition, and presents in support of that side of the controversy a succinct and well reasoned argument.

The conclusion reached, however, is somewhat qualified by the assertion that it does not imply that a state, in the absence of treaty or contractual obligation, is free to discriminate against foreigners and attack their property alone. Such a discrimination, Sir John says, "would rightly be regarded by the states of the foreigners affected as an unfriendly act inconsistent with the relations which ought to subsist between the members of the international Society." And he admits that "There are conditions conceivable in which it would not be a sufficient answer for a confiscating state to say that it was treating its own nationals and aliens in the same way"; an admission which goes far to impair the force of the argument in support of the conclusion previously stated.

Professor A. Pearce Higgins writes upon "Treatment of Mails in Time of War," giving an interesting account of the censorship exercised, especially by the British Government, during the Great War. In this respect, as in others, the nature of the conflict resulted in the adoption of methods which previously had been regarded by most civilized nations as outgrown in the progress of a developing and higher international morality.

Professor Brierly deals with "The Theory of Implied State Complicity in International Claims," a theory which is implicit in many of the awards against the Mexican Government rendered by the Mixed Arbitral Tribunal in favor of citizens of the United States. His discussion involves a consideration of what are the delinquencies of a State, for which it is liable when the person or property of an alien within its boundaries is injured, and what is the true measure of damages in a claim by one State against another for having omitted to take proper steps to punish an individual wrongdoer against one of its nationals.

Vice Admiral Sir Herbert Richmond contributes an article on the "Value of the Right of Capture at Sea in Time of War," which is a sharp criticism of a work by Mr. Jacques Dumas (Tome I, Les Aspects économique du Droit de Prise avant la Guerre Mondiale; Tome II, Les Aspects économique du Droit de Prise apres la Guerre Mondiale), which maintains that war upon commerce cannot produce decisive results and that private property should be inviolate in war. Admiral Richmond cites the writings of Admiral Mahan in opposition to M. Dumas and dwells upon the nature of the commerce of the Central Powers in the Great War.

"If war against commerce," he says, "had merely as its object economic injury to an enemy, and had no relation to compelling an enemy to com-

pliance, either directly or indirectly or in association with military operations, the condemnation of the economists would be justified; and that condemnation applies to war in any form. But that is not the object. Therein lies one of the principal reasons for dissenting from the conclusions arrived at by M. Dumas in his able argumentation."

Dr. McNair discusses the subject "When British Treaties Involve Legislation"; a topic which is familiar to students of American constitutional law, but which only recently has been of very practical importance in British law, as a result of the momentous changes in the British constitution following the World War.

Miss Lillian M. Friedlander contributes an interesting discussion of the "Theory of the Admission of States to the League of Nations."

Miss V. M. S. Crichton writes on "The Pre-War Theory of Neutrality," and Mr. G. M. Clark, of Oriel College, Oxford, has an historical article on "Neutrality, Commerce in the War of the Spanish Succession, and the Treaty of Utrecht."

While recognizing the interest of these articles, we must confess to a feeling of some disappointment in the subjects dealt with in this volume. It seems to us that they are generally of less interest and of less permanent value than those of previous years. We cannot but contrast the value of the volume in its entirety with that which is furnished by either the American Journal of International Law, or by "Foreign Affairs." It is true that the British Year Book is an annual publication, whereas the two American publications mentioned are quarterlies. But almost any one of the quarterly numbers of the American journals referred to, gives as much, if not more, material of value to students of international relations than the British Annual. The latter furnishes, aside from a bibliography and the summary of events, about 212 pages of material, which is substantially the amount given each quarter by the American Journal of International Law and only about fifty pages more than a single number of the quarterly "Foreign Affairs." The British Annual for the current year furnishes eight major articles, substantially the same number found in each of the quarterly publications of the American Journal, and from four to six less than is given by each number of "Foreign Affairs." The current notes and editorial comments given by the two American reviews in each number substantially equal the number given by the British Year Book for the year. The subjects dealt with in the American journals appear to have, on the whole, a more practical and timely value than those in the British Year Book, especially that for 1928. In 1927, the Journal of the American Society of International Law furnished articles by the leading American scholars in International Law, including James Brown Scott, Manley O. Hudson, Tasker H. Bliss, James W. Garner, Edwin D. Dickinson, Jesse S. Reeves, Edwin M. Borchard and Quincy Wright, on such subjects as "The United States and the Permanent Court of International Justice"; "American Foreign Policy"; "Disarmament"; "Consular Privileges and Immunities Under the Treaties of Friendship, Commerce and Consular Rights"; "The Codification of International Law"; "Effect of Changes of Sovereignty on Nationality," etc. There were fewer purely historical discussions than those in the British Year Book, but more articles by competent writers upon questions of present interest and importance. When it is considered that the price of the British Year Book in the United States is $5.50, whereas the numbers of the American Journal of International Law and of "Foreign Affairs" sell for $1.50 apiece, including the valuable Supplements to the Journal of the American Society of International Law containing copies of important treaties and other official documents, we feel that if the British Year Book is to continue to have any considerable sale in the United States, it must give more careful consideration to the subjects of the articles which it publishes and the volume of material furnished, or substantially reduce its American selling price.

GEORGE W. WICKERSHAM.

New York City.

The Law of Bills of Lading. By Ernest W. Hotchkiss. 1928. New York. The Ronald Press. Pp. xvii, 287. This book contains brief digests of some decisions regarding bills of lading, copies of the domestic and export bills of lading in common use, and copies of the more important federal and state statutes governing the law of bills of lading and shipping.

About half the book is given over to very brief summaries of about 280 cases, almost entirely American. The form and content of these digests leave much to be desired. The cases selected are by no means the best, nor is the list at all exhaustive. For example, the following leading cases are not found in the table of cases: *Lovell v. Newman & Son,* 192 Fed. 753; *Robinson v. Pogue,* 86 Ala. 257; *Greenwood Grocery Co. v. Canadian Mill & Elev. Co.,* 72 S. C. 450; *Moore v. Louisiana Nat. Bk.,* 44 La. Ann. 99; *Farmers' and Mech. Nat. Bk. v. Logan,* 74 N. Y. 568; *Stollenwerck v. Thacher,* 115 Mass. 224; *Pollard v. Reardon,* 65 Fed. 848; *Commercial Bank v. Armsby,* 120 Ga. 74; *Roland M. Baker Co. v. Brown,* 214 Mass. 196; *Anchor Mill Co. v. Burlington, C. R. & N. Ry. Co.,* 102 Iowa 262; *Stamford Rolling Mills Co. v. Erie R. Co.* 257 Pa. 507.

There are no references to law review articles. A great mass of discriminating discussion is thus neglected. See, for example, 26 Columb. Law Rev. 63, 330.

There is no mention of the use of the bills of lading in connection with letters of credit. The Sales Act is badly slighted. The topics of reservation of property and stoppage in transitu in sales are treated very scantily and with almost no discussion of the very important provisions of the Sales Act with regard thereto.

The principal utility of the book will be in its assembling of forms and statutes under a single cover. The ten forms of bills of lading given in the appendix and the federal and state bills of lading acts and other related statutes found there also are valuable items.

GEORGE G. BOGERT.

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Law in the Making. By Carleton Kemp Allen, 1927. Oxford: Clarendon Press. Pp. xxiii, 387. The author attempts by the use of this title to avoid the ambiguous term "sources," but he makes it very plain in his introduction that he does not use the word "making" in the Austinian sense. His standpoint is that of the historical jurist. For him law is not *made* but *grows* and he at once disposes of John Austin's thesis that the sovereign is the source of law. This may seem super-

fluous to the present day legalist who is thoroughly convinced that the law does grow under the supervision of the courts and that legislation is valuable only after it has been interpreted and assimilated. Nevertheless, the concise and accurate account of the development of historical jurisprudence is not without value for the general reader even though it is addressed primarily to the English jurist, England being the only country in which, as the author says, "the Austinian dogma is regarded today as anything but an anachronism."

In his discussion of custom as a source of law the author gives due credit to Savigny, the great founder of the historical school. "There is," he says, "a native law of the community and its origins are to be found in sociological elements." But he rejects the fanciful concept of the *Volkgeist*, derived from Romanticism, as being, in the emphatic words of Rudolf Stammler, "a most depressing influence on the science and practice of law."

An excellent account of the doctrine of the value —or lack of value—of precedent in French law is given on pp. 118-123. This may make clearer to the English lawyer the effect of the Law of April 1, 1837, passed to qualify Article 5 of the French Civil Code, which forbids judges "to pass upon causes submitted to them by way of general disposition or so as to formulate a rule."

It seems to the reviewer that the author's discussion of equity as a source of law would have been more helpful if it were plainly recognized that there is a real distinction between what the Romans call *jus gentium* and what they speak of as *jus naturale*, but in this he errs with Justinian and with Gaius and he is, therefore, in good juristic society.

The book is clear and concise in style and will be very useful to those seeking an orientation in historical jurisprudence, and, in the reviewer's opinion, would not be an unworthy tribute to the great master in that field, Sir Paul Vinogradoff.

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STATE MEMBERSHIP DIRECTORS—1928-29

FOLLOWING is a list of the State Directors who will cooperate with the Membership Committee in increasing the roll of members of the Association during 1928-29. The membership campaign plans of the past have been revised and it is hoped and believed that excellent results will be achieved by the methods to be employed:

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Nevada—John Bernard Foy, 15 West Second Street, Reno.
New Hampshire—Louis E. Wyman, Merchants Bank Building, Manchester.
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New Mexico—Orie L. Phillips, U. S. Court Chambers, Albuquerque.
New York—Announcement to be made in the next issue.
North Carolina—William M. Hendren, 725 Wachovia Bank & Tr. Co. Bldg., Winston-Salem.
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Oregon—Lawrence T. Harris, 201 Miner Building, Eugene.
Pennsylvania—Edgar S. Richardson, Sixth & Court Streets, Reading.
Rhode Island—James C. Collins, Hospital Trust Building, Providence.
South Carolina—J. Waties Thomas, 1001 Columbia Nat'l. Bank Bldg., Columbia.
South Dakota—Hon. Dwight Campbell, Supreme Court Chambers, Pierre.
Tennessee—William P. Metcalf, Exchange Building, Memphis.
Texas—Palmer Hutcheson, Esperson Building, Houston.
Utah—Wilson I. Snyder, 419 Judge Building, Salt Lake City.
Vermont—Horace H. Powers, St. Albans.
Virginia—Robert E. Peyton, Jr., Richmond.
Washington—Loren Grinstead, 1408 Dexter-Horton Building, Seattle.
West Virginia—C. W. Flesher, Gassaway.
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NEWER TESTS FOR PROSPECTIVE LAWYERS

Scientists in the Field of Education and Psychology Have Laid the Foundations of Better Methods of Determining Fitness to Enter Legal Profession—Some Criteria of Good Examinations—Objections to Essay Type of Bar Examination—Remarkable Columbia University Studies in "Measurement of Law School Work"—New Type Questions — Oral Examination, etc.

By Milton D. Neuman
Member of New York and New Jersey Bars

1. Introductory

NUMEROUS circumstances necessitate the taking of steps in the direction of raising the intelligence level at which individuals may be admitted into the legal profession. The increasing complexity of modern legal situations demands a greater proficiency on the part of members of the Bar, and an intensified sensitiveness and feeling for the refinements of the law on the part of those who seek entrance into the profession.

The difficulty lies in determining how marked the changes in present day methods of ascertaining legal intelligence and fitness shall be. To impose restrictions which arbitrarily make entrance into the profession more difficult and serve no other purpose is indefensible. In adopting further tests, advantage must be taken of the advances of science in the examination of mental processes generally and specifically in the measurement of the achievement of the individual in the law and in other vocations which require intelligence of a similar degree.

The field of scientific research which deals with the measurement of intelligence is that of applied psychology. This science deals among other things with the question of the proper administration of educational methods and the measurement of achievement after the completion of definite courses of study. It analyses existing tests and discovers wherein they fail to test what they purport to test. It measures minimum and maximum intelligence requirements and prophesies with much accuracy the potential capacity of an individual for definite types of work. The investigations of the psychologist will help us to find out whether the fault lies with one or more of the present day requirements or merely with the administration of these requirements. Having found this, they will enable us to eliminate these errors either by modifying or supplementing present day methods.

In developing the subject, the conclusions of psychologists and educators will be applied generally to the question of appropriate legal tests. The elements which must be present to constitute a good examination will be considered; objections to the present type of bar examinations will be set forth; new type examinations and questions will be discussed and the results of an important study of the use of old and new type questions in law school examinations will be outlined. The discussion will then consider the use of an oral examination as supplementary to the written bar examination, and the use of special aptitude and intelligence tests for prospective law students.

II. Some Criteria of Good Examinations

The more important characteristics of an examination which will really test intelligence or achievement are: validity, reliability and objectivity. Unless at least these criteria inhere in an examination, it is bound to fail as a genuine test. Each of these criteria is based on the concurrence of certain factors, the existence of which may be checked up by a number of methods.

Validity deals with the degree to which a test actually measures the material of the subject. To attain validity the entire field of the examination should be divided into its component parts. Whatever the subdivisions finally agreed upon may be, an examination to be truly valid must comprehensively sample the entire subject in the light of these capacities. In the field of the law and of the bar examination, the following rather crude outline is suggested as setting forth some of the traits and abilities which it is necessary to seek:

1. A knowledge of the salient principles of law, at least in the most important subjects.
2. The ability to apply a definite principle of law to a given state of facts.
3. The ability to find the law bearing on the problem under consideration.
4. The ability to distinguish between the ordinary and technical meanings of words or phrases commonly used in legal forms or agreements.
5. The ability to express oneself properly in writing.
6. A similar ability properly to express oneself orally.
7. A familiarity with ordinary forms of pleading.
8. A familiarity with the proper methods of executing legal documents and the ability to draw up simple instruments.

After an analysis similar to the one suggested has been made and the questions based thereon have been compiled the problem of the validation of individual questions presents itself. Tentative examination questions should be considered carefully by a number of competent persons. The validity of each question may then be decided by their combined judgment. After a number of examinations have been given the question of validation becomes a much simpler problem. The poorer ques-

tions are gradually sifted out. With practice in the technique of building examinations comes a greater degree of expertness in the exclusion of objectionable matter.

The reliability of a test refers to the accuracy with which it measures whatever it does measure (not necessarily what it claims to measure). Reliability increases directly as the length of the test increases. It is decreased by catch questions, faulty wording, poor sentence structure, inadequate directions, distractions in the test conditions and similar factors. It is technically shown by a coefficient of correlation, which expresses statistically the degree to which two series of scores attained in two different sets of measurements agree.

Coupled closely with the question of reliability is the degree of objectivity which an examination possesses—the extent to which the marking and construction of the test is free from the personal judgment of the examiner. While the choice of questions and even of answers involves something of the subjective, the use of great care may reduce this element to such an extent that it is almost completely absent. In the scoring of an examination, the degree in which objectivity exists is indicated by the extent to which the paper can be marked by any intelligent person (other than the examiner) to whom the correct answers have been given.

III. Some Objections to Essay-Type Bar Examinations

The bar examination of today consists of a series of questions which require answers in the form of short essays. It presents a relatively small number of questions and presumes by means of these few scattered questions to gauge exactly the legal fitness of the examinee. In a field which contains as many ramifications as the law, the futility of such an attempt is obvious. It places too great a penalty on the qualified student, since his failure to answer a single question due to lack of comprehension, to the subjective reaction of the examiner or to any other reason penalizes him to the extent of a relatively large percentage of the total score. Spread over an entire examination, the chances for error arising from this source are exceedingly great. Touching only the high spots of the law as this inadequate sampling does, a premium is placed upon the ability of the instructor of a quiz-course or of a professional coach to outguess the Bar Examiners and to predict successfully a number of the bar examination questions.

To be effective an examination covering knowledge of legal principles should also not place too much importance on the ability of the person examined to arrange his thoughts in proper sequence. In its attempt to measure the existence of both factual knowledge and the ability to express conclusions in clear, precise English, it is questionable as to whether the essay-type of examination succeeds in measuring either. Each of these objectives is an aim to be separately attained in a form of examination definitely adapted to its discovery.

This type of examination also fails to measure consistently what it purports to measure. Tests which are really accurate measures will continue to show approximately similar results in successive tests. Too frequently, however, does an applicant fail in a number of bar examinations and then finally succeed in passing one of them, thereby gaining admission. In many of these cases, the legal intelligence of the individual is often no greater on the last successful attempt than at the time of the previous failures.

The subjective character of this type of examination also contributes greatly to its unreliability. Numerous studies have conclusively shown that any examination which depends for its value in any great degree upon the subjective attitude and emotional reactions of the person marking it must fall far short of the truth in its appraisal of actual accomplishment. What is true of examinations in other fields is just as true of law examinations.

Investigations conducted throughout the entire field of education show how false is the assumption that the use of the essay-type of examination solely will result in an accurate appraisal of an individual's attainments. The limited sampling of the subject matter, the subjectivity of the marking and the confusion due to the intermingling of impressions as to knowledge of facts and ability in prose expression all conspire to rob it of its truly useful functions.

IV. The New Type Examination

The relatively new objective type of examination consists of a great number of questions spread over the entire field of the subject. The answers required are short. The ability to present one's thoughts properly is not investigated in them. They attempt and purport to test only what lies at the basis of intelligence—the knowledge of and the ability to think in the subject matter of the course.

One of the objections raised to this form of examination is that the only thing which it can measure is superficial knowledge—the ability to remember disconnected facts. It is, however, psychologically impossible to possess any great amount of knowledge in any subject unless that knowledge is effectively organized. Organized knowledge presupposes the existence of thinking ability, the ability to bring about an orderly grouping of the propositions contained in a subject. Information properly applied to the topic of an examination does not exist as a thing isolated from the mental process. Unless thinking ability is present the person being examined will fail to answer correctly many of the great number of questions which can be put in the new type examination to ascertain the extent of his factual knowledge of the subject.

Another objection made to the new type of question is that it is impossible to ascertain whether it has been completely understood, since no opportunity is given for any explanation. This form of question is to the contrary, of particular value in bar examinations on account of the fact that it compels the examinee to scrutinize and thoroughly understand the language used. It is just this ability to comprehend the meaning of a plainly worded question which will often indicate the difference between a good lawyer and a poor lawyer. This type of question promotes accuracy of thought and requires the use of such good judgment in the answering as a lawyer would ordinarily be called upon to use in the course of an ordinary day's work.

The objective forms of question by eliminating the laborious essay answers permit a wider sampling of the field of the examination. They thereby make it possible to submit a much greater

number of "key" questions. This gives the examiners an opportunity for a clearer insight into the existence or non-existence of the special intelligence necessary for the practice of the law.

The new type of examination also makes it possible to place some of the burden of marking papers in the hands of intelligent persons other than the examiners. It thus relieves the examiners of this tiresome task and gives them more time for the important work of constructing valid and reliable examinations and for other perhaps just as vital steps in the process of ascertaining fitness for admission to the Bar.

V. A Study In "The Measurement of Law School Work"

A very comprehensive study of the subject of "The Measurement of Law School Work" has recently been completed by Professor Ben D. Wood, Director of the Achievement Test Research of Columbia University. In the course of his articles (See Columbia Law Review March 1924, March 1925 and Nov. 1927) Dr. Wood sets forth the results of thorough investigations into the question of law school work especially with regard to law school examinations. In this study which extends over a period of approximately ten years, Prof. Wood examines the tests given in the Columbia University Law School. Examinations of the old type, examinations of the new type and examinations containing both types of questions have been intercorrelated in numerous ways. These have in turn been correlated with the grades achieved by students.

One correlation is based on the records of over 200 students who took four final examinations containing both old and new tests. One old type correlated with one new type test showed a correlation of 0.565, two old type with two new type tests one of 0.775, and four old tests with four new tests one of 0.840. The correlations show a progressive improvement as one of each kind of examination is added. While the variation is in part due to other causes it indicates on the whole that either one or both types of tests are unreliable. The investigation then proceeds to find where the fault lies.

One of the methods of measuring the reliability of an examination is by dividing it into random halves. This is done by placing in one half all the even numbered questions and by placing all the odd numbered questions in the other half. Correlations between random halves of seven essay tests and similar correlations between random halves of seven new tests were made. The estimated reliability co-efficients of the old type tests on which these correlations are based range from 0.59 to 0.73, while those of the new tests range from 0.72 to 0.92. These figures indicate that the unreliability shown above in the relationships between the old and the new tests lies not in the new tests but in those of the old type.

The marks in four law courses in which both essay examinations and new type examinations were given were also correlated. Not only were the correlations in the new type tests higher than those in the old type essay tests, but the variations in the new type tests ranged from 0.723 to 0.80, while those in the essay examinations ranged from 0.38 to 0.558. As between the various pairs the new type tests showed greater consistency.

These results were then checked in order to make certain that the new tests did really measure abilities and achievement in law school work which are of genuine significance. The criterion was based upon the assertion made by the opponents of the new type tests that the average of three or four examination grades constituted a very satisfactory index of a student's ability and achievement in law school work. When taken in connection with the other correlations given the results indicated that the new tests are not only more reliable but are on the whole more consistently in agreement with the actual achievement of the student.

The examples given are typical of numbers of other correlations which were made, based on comparisons between examinations in many law school courses. All of these correlations point to the superiority of the new type over the old type of examination.

The results of his study may best be stated by Professor Wood (Columbia Law Review Nov. 1927):

"Every correlation presented, without exception clearly and consistently favors the conclusion that the new type examinations give more accurate and more reliable measures of reasoning ability than old type examinations of equal or greater time allowance, both when we compare the new and old type examinations singly or in combination. In the face of such data, it seems impossible that the idea could persist that the objective examinations measure only factual knowledge and isolated bits of information. There does not seem to be any tenable alternative to the conclusion that, unit for unit of examination time, the new-type examination gives a more reliable and comprehensive measure of reasoning ability than the old type, because the criterion used is the very one set up by the opponents of the new-type of examinations as the most reliable and valid index of reasoning ability available.

"The practical significance of this conclusion is not that the time honored essay form of examination shall be cast out of law examining procedures, but that the new type may be added to them without fear that "memory freaks" shall be elevated to the bar to the exclusion of those "reasoning types of minds" so necessary to continue its high traditions and extend its notable achievements. On the basis of the conclusions stated above we may confidently hope that by the judicious use of objective new-type tests in our law examinations we shall select aspirants to the bar more effectively than heretofore, and eliminate the unfit from law classes more surely and also earlier in their law school careers. The large numbers of students who are allowed to drag on through the second and even the third year in American law schools, only to be ultimately eliminated in academic disgrace, constitute a tragic indictment of the educational guidance vouchsafed to students by our law faculties. That such misguidance is largely or at least partly due to the unreliability and variable meaning of our examination results, no one will dispute."

In reference to the use of the new type of examinations in tests outside of the colleges and law schools Professor Wood states in the same article:

"New type examinations aggregating about 300 questions each have become regular parts of the examinations of the New York State Board of Law Examiners. The Law Examiners have been using new-type papers in some of their examinations during the past three years. . . . Altogether the indications are that in a fairly short time, particularly in view of the accumulating evidence that the new type really does measure reasoning ability, the majority of the law schools and examining agencies of the country will be exploiting the resources of the objective types of examination as fully as the non-professional colleges and secondary schools are, even to the point of developing truly standardized tests yielding comparable measures, in those aspects of the law in which such measures are feasible."

Professor Wood's conclusions as to the value of the essay type of examination and as to the form

in which it should be retained are these (Columbia Law Review, March, 1925):

"The essay examination shows its greatest strength when it consists of only two questions chosen out of four or five alternatives. Such a plan delivers the essay from the task of measuring range of information and leaves it free to measure what it is best adapted to measure—ability to think through and persuasively present the solution of a legal problem of which the relevant facts are known to the student. By giving the student a choice of two problems out of four or five alternatives, we increase the chances that he really knows the facts necessary for the solution of his chosen problems. If the student knows the pertinent facts and fails to present a cogent and convincing solution, the teacher may with much greater assurance lay his failure to lack of reasoning ability. If, on the other hand, the student is compelled to write on three out of three questions, he may fail on one or even two, not for lack of reasoning ability, but because he chanced not to know the particular rule or rules pertinent to a particular feature of the problem. Reducing the number of questions on an essay examination without giving the student a choice of problems will inevitably weaken the essay examination as a measure of reasoning ability unless the problems are so carefully selected by the Professor as to insure that every student who deserves to pass knows the facts and rules pertinent to a satisfactory solution. Otherwise, the essay examination of two or three required problems is merely a more unreliable test of information than one of eight or ten problems."

These tests, it is true, have concerned themselves primarily with examinations in the law school. The bar examination is, however, so closely related to the law school examination that everything which this investigation discloses in reference to the reliability of the new objective type of examination in the law school, to the unreliability of the essay type of examination and to the necessity of discriminatingly using each form applies just as fully to the bar examination.

VI. Different Forms of New Type Questions

Objective questions are divided into two general types: (1) the recall type and (2) the recognition type. The recall type has two forms: (a) simple recall questions and (b) completion exercises. The most frequently used forms of the recognition type are: (a) multiple response (b) true-false (c) best answer (d) matching exercises and (e) rearrangement tests.

Examples of the simple recall question follow:

1. The proper prerogative writ to use in testing A's right to occupy a public office, which it is claimed that he wrongfully holds, is that of.....

2. A dies intestate leaving her surviving a husband and three children. The fractional part of her personal estate which each child will receive is.....

Such questions are better adapted to the discovery of the existence of accurate knowledge and reasoning ability than might at first seem possible. The person examined must in order to answer them correctly search his memory just as carefully as though the questions required the writing of answers of the essay type. Chances of guessing correctly are slight. Since they require only the insertion of a single word or a short phrase, numerous other questions may be answered in the time which would ordinarily be consumed in answering the same question in the traditional form.

The completion test is a variation of the simple recall form of question. An example follows:

The rule in Shelley's case is that where an estate is limited to a person (A) and the same instrument contains a limitation either mediate or immediate, to his heirs, the word "heirs" is a word of..... Where, at common law, A to whom such an estate was given by deed then conveyed title to B and A subsequently died leaving a child C, at A's death, ... was entitled to the fee. Under similar facts, if A received his estate by devise, ... was entitled to the fee. Under the present rule in New Jersey with the facts similar to those given, if A receives his estate by deed, at his death, ... would be entitled to the fee, while if A receives his estate by devise, at his death ..... would be entitled to the fee.

In the completion exercise, thus, the rule is presented in a clear and careful manner with the exception of a few omitted key words which can be filled in correctly only by a person who really knows the rule. This form of question militates against answers which set forth rules which may be repeated in a parrot-like manner without the examiner being any the wiser. They can be framed in such a way as to probe deeply the real knowledge of the examinee of fundamental legal principles.

In the recognition type of question two or more suggestions as to the correct answer are given from which a selection may be made. One of its forms is the multiple response question. This presents a statement and gives with it a number (say, from five to ten) of answers all except one of which are incorrect. The number opposite the proper answer is placed in the blank at the end. An example of this form is:

The parole evidence rule is set forth in the case of (1) Pennoyer v. Neff, (2) Hunt v. Rousmanier, (3) Naumberg v. Young, (4) Marbury v. Madison.

Questions similar to the multiple response type are the best answer or judgment tests. The question presents a problem. Several alternatives for its solution are suggested. Of these one is undoubtedly the proper one while some of the others seem plausible. This form of question allows the presentation of many problems in the decision of which clear thought and judgment are required. The lengthy time-consuming response of the essay type of question is eliminated, but a similar result may be obtained in probing not only into the factual knowledge but also into the reasoning ability and judgment which the examinee possesses.

The true-false type of question is the kind which has been most often used in the new type tests. This form is presented in two different ways. In one case the statement given is to be marked either true or false while in the other it is in the shape of a question to which a yes or no answer is given. The correct answer is to be underlined. These are examples.

1. In a deed A and B, husband and wife, and C, are named as grantees. The property described therein is sold at a net profit of $2,400. Of this amount C is entitled to $800. True. False.

2. If all the other requirements have been complied with is it necessary that a holographic will, in the body of which the name of the testator appears, be signed by the testator in order to validly dispose of his property? Yes. No.

The true-false questions possess the advantage of almost complete objectivity, and are comparatively easy to construct. They may deal, however only with material about the truth or falsity of which there is no doubt. Whatever apparent error may arise from guessing, since there are only two possible answers, is remedied in great degree by a method of marking by which the score attained is computed by subtracting the number of wrong answers from the number of right responses.

In the matching exercise a list of ten or fifteen statements are set forth in one column and

a list of the same number in another column. The person examined is required to match the statements contained in one group with those in the other group. The question suggested above for the multiple response question could be easily converted into this form. Opposite each of the principles is placed a blank in which is to be inserted the number given opposite the case which sets forth the principle.

Matching exercises can be used to test knowledge of legal definitions and of general legal principles. A group of a dozen definitions can thus be set off against the same number of terms. If the definitions are in some respects similar to each other, unless each is really possessed as part of the knowledge of the examinee, he will improperly match a number of the pairs. In order to create an even more accurate test, it is also possible to place in one column a greater number of items than in the other.

In the rearrangement test a number of acts or statements which are supposed to follow in a definite order are haphazardly listed. The task of the examinee is to properly rearrange these. This type of question is best adapted to questions which involve legal history and the development of a certain division of the law, to questions of procedure or to any problem where a series of acts must be done in a certain chronological order.

The construction of the objective question demands a much greater degree of care than does the framing of the essay type question, since exactly the same idea must be conveyed to every intelligent person who takes the examination. Educators and psychologists have given a considerable amount of thought to this problem and certain well defined rules have been worked out which if followed carefully allow of the framing of questions in such a way as to eliminate almost entirely the possibility that a student will give an incorrect answer due to the improper framing of questions.

With numerous legal problems the different forms of new type questions allow a presentation of the same question in different ways, and if of sufficient importance it may be repeated in another examination by the use of a different form of question. The ultimate answer will be the same, but the steps in the mental process may be quite different. In the other forms the question although fairly framed may appear to be quite at variance with the same question presented in its original form.

VII. The Oral Examination

Present day examinations leave uninvestigated one great field—the ability of an applicant for admission to the Bar to present orally an intelligent solution of legal problems. In the course of his ordinary practice, every lawyer is required to elucidate upon simple points of law in such a manner that his client may understand what his legal rights are. There is no way of determining the existence of this ability except by subjecting the applicant to an oral examination.

The main difficulty with the oral examination prior to admission to the Bar has arisen in connection with its administration. The examination of large groups of applicants by Bar Examiners would impose too great a burden on them, since in such an examination from fifteen to thirty minutes must be devoted to each person examined in order to secure a real idea as to the existence of this ability.

One solution may be supervision of the oral examination by small committees, similar to the present committees on Character and Fitness, designated by the Bar Examiners for certain counties or parts of the state. In order to preserve the incognito character of the examinations, which they must continue to have if the element of personal friendship is to be eliminated, certain restrictions may have to be placed on the examination of certain applicants by certain committees. It may be considered advisable that the applicants residing in one county be examined by a committee chosen from the Bar of another county. A similar restriction may compel a member of a committee who is acquainted with or interested in any way in the applicant to withdraw from the committee temporarily and allow another person chosen by the Bar Examiners to act in his place.

The oral test should be marked as part of the entire examination for admission to the Bar and rated according to the estimated relative importance of this ability as compared with all the other necessary abilities. As has been suggested in reference to the written essay type examination, the choice of two or three of a number of questions on which to speak must be given in order that there may be a real opportunity for exhibiting powers of analysis coupled with oral expression.

VIII. General Intelligence and Special Aptitude Tests For Prospective Law Students

For many years, general intelligence and special aptitude tests taken from various phases of the work which a particular occupation involves have been used to exclude those who by reason of some deficiency of mind or body should not enter into work in that field. General intelligence tests are used to determine whether or not the individual examined is possessed of at least the minimum of intelligence necessary for entrance into that work. Special aptitude tests are used to determine the existence of real fitness for the particular occupation. It is by putting into practice the principles upon which vocational guidance rest that many of the unfit can be saved from fruitlessly spending some of their most valuable years in the endeavor to enter the ranks of the legal profession.

The problem which is here presented is somewhat simpler than that which vocational guidance generally involves, since it is not necessary to choose into which one of a number of occupations the individual may be advantageously placed. He presents himself and asserts his fitness for entrance into the study and eventually the practice of the law. It is necessary merely to establish the level below which intelligence may not descend if fitness for this profession is also present, and the factors which indicate a special aptitude therefor. All that need then be determined is whether or not the applicant meets these requirements.

Such a test is really nothing new. Today the criterion is arbitrarily made the completion of a high school course or of a year or two of college (or their equivalents). Requirements based on the amount of time spent in study do no more, how-

ever, than establish a presumption as to the existence of the required minimum of intelligence. To point to the differences in the character of the training given at various institutions and to the decided variances in the absorptive powers of different individuals would be merely argumentative. The accurate ascertainment of the results of pre-legal training demands the use of a more accurate gauge. The measurement must be based not on the time element, but on the amount of achievement which the individual displays. That achievement must be of the special type which fits him for the study of the law and eventually for its practice. The use of general intelligence and special aptitude tests as supplemental to these requirements will aid in helping to reach the ultimate goal.

These tests may be used on a basis similar to that which is proposed to be used in admitting students to the Law School of Columbia University. The test will be in the form of a three hour examination which will reveal the student's ability to deal with abstract ideas and symbols. The Dean in announcing this test says:

"It is an attempt to test the capacity of an applicant to perform the 'mental stunts' of a lawyer. It is not the same as the old army intelligence test, but is based on somewhat the same principle. For instance, we give a man a sentence to read, then take it away from him and make him summarize what he has just read in his own words. A man who can't do that satisfactorily will not make a good lawyer.

"Both at Harvard and Columbia numbers of men with college degrees are excluded annually at the end of the first year because of unsatisfactory work. To permit these men thus to waste a year of their lives is not only unfortunate for them but their presence in the school seriously interferes with the work of the more capable students. If there is a practical way of detecting these men in advance of their admission, no one would question the desirability of denying them admission.

"Beginning in 1921 and extending over a period of four years, an elaborate and carefully prepared examination calculated to test the general capacities of the students was given to all the members of the entering classes. These papers were rated and at the end of three years the student's grades in the law school were compared with his rating on the capacity test given at the beginning of his first year.

"The last of these tests was given in 1924 to the class which graduated in 1927. The results of this experiment show that over 90 per cent of the men who scored below a certain grade on the capacity test did poor work in law school. Most of them were either excluded from the school during the first and second years or else failed to graduate. This correlation remained almost constant over a period of four years, making it fairly certain that the capacity test was a reliable device for detecting in advance most of the men who were almost certain to fail in their law school work."

Similar tests may be used to supplement the requirements as to preliminary education and to act as a check on the prima facie case which compliance with them has presented in favor of the fitness of the individual to engage in the study of the law. On the other hand, they may be used purely for purposes of vocational guidance, so as to enable one to advise an applicant who fails to pass them, that it would be more profitable for him to seek employment in other fields. In the latter case, instead of allowing the refusal of admission of the applicant to be finally or temporarily determined by such a test, it shifts the resolution of the question of continuing with his legal studies over to the person who has failed to satisfactorily pass the test.

The building of adequate tests of this character presents no new psychological problem. As with the testing of capacities in other fields, it involves merely the ascertainment of the things which it is sought to find the existence of. The methods which have been used in numerous trades and vocations need then be but adapted and applied.

IX. Conclusions

Due to limitations of space, it has been impossible to cover fully the subject matter of this article. Some of the propositions presented indicate, however, that there is an immediate possibility of altering the present methods of ascertaining the existence of legal intelligence so that only those who are really fitted for the practice of law will find it possible to gain admission to the Bar. The application of educational principles to the problems connected with admission to the Bar and certain other aspects of the subject which have been referred to only in passing should be made the objects of further inquiry.

Is it necessary that the ability of an applicant to do legal research work shall be determined? If it is, when and how shall this be done? How shall tests of ability in oral expression be administered? Shall bar examinations extend over a number of days in order adequately to cover the field? If it be determined that examinations other than the bar examination in its present form be used, what relative value shall various parts of the examination bear to one another? Shall there be some form of supervision over law schools and law school examinations? Is it necessary that the social sciences, psychology, economics, logic and other subjects be made mandatory in pre-legal work in order to lay a proper foundation? These are but some of the other phases which demand further thought.

To conduct this investigation a committee composed not only of lawyers, but also of psychologists and educators should be appointed. This committee should consider carefully what has been done in various jurisdictions in reference to newer tests or to modification of the older tests for admission to the Bar. It should consider what new requirements have already been imposed for admission into the legal profession and into other professions and report upon the fairness of these and their effectiveness in raising the standards in those jurisdictions in which they may have been in use for any length of time.

It is thus only that one can hope to fairly determine all the changes that eventually ought to be made in present-day methods of ascertaining legal fitness. Scientists in the fields of education and psychology have laid the foundation work. The task that now remains is to take advantage of the results of their labors and to apply them to the solution of this problem.

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AIR LAW—THE NEW FIELD

International Aspects of Air Law Problems—A Force Making for Peace and Concord—University Recognition of Significance of New Branch—Various Basic Questions Fairly Well Settled but Others Await Lessons of Experience—Uniformity in Air Legislation and Ordinances—State of Law in States—America Needs Greater Air-Consciousness

By W. Jefferson Davis

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A STRIKING and most powerful agency furthering concord among the leading nations of the world has arisen on its own wings, and regardless of the wishes of statesmen who may be inclined to protect the barriers and jealousies of individual states as against agreements and comity among nations. This is expressed in the insistent international attitude towards radio and aviation. Whether or no, these new instruments leap over oldtime boundaries and prejudices with little or no regard for frontiers or limitations except as Nature imposes.

Big business took up with radio as soon as it was made thoroughly practical, and is just beginning to administer aviation. This means that the law of the air, which comprehends both these systems of communication and commerce, is now being formulated and standardized through the influence of use and not according to prejudice and past conceptions. Law, which has concerned itself in the centuries of the past with matters on the ground and the oceans, has been compelled to add an entirely new field.

Business men, flying experts, statesmen and legislators, bar associations and international congresses and conferences have given much serious attention and action to laws regulating radio and air commerce. The American Bar Association has been a potent factor in formulating international and national law relating to these innovations in communication, and radio especially has been dignified abroad with important and practical conferences on its regulation, followed by the International Radio Conference which convened at Washington in October, 1927.

These are formal and regular recognitions of the necessity of establishing and ratifying laws over radio and flying. The less known and yet tremendously powerful influence of use of the air is that invisible pressure exerted on international relations and extending even to support of the League of Nations. It has already had some effect and must inevitably be a great factor making for adjustments and friendly relations. Nations must get together on new standards whether they like the idea or not when they consider radio and aviation, for they cannot ignore either and commerce demands that they do get together. In coming to agreement on these subjects they are the better prepared to adjust phases of other matters.

This development in Europe is very plain to any observer of international relations since the world war. It is as interesting as the more technical and apparent plans to give legal standing and direction to aviation and wireless communications. The latter is the new field for law, which, startling and unprecedented as it is, has been fairly well set in order. The other and invisible course has reached out without suggestion from legal minds and is deflecting international channels around obstacles and dams to progress and accord of nations.

Aviation has not been regarded in this light; it was thought very generally that it would sit in the office of war waiting for a job. Instead it has gone boldly into transportation and called lustily for freedom whenever the old ideas have interfered. It is now, in Germany, a distinct influence for peace, asking to be let alone as a commercial undertaking; and the larger and more far-reaching German air commerce becomes, the stronger will be its opposition to war.

This typifies the new feeling in commercial flying, and as air commerce is better established over the world it will be more and more loath to be drafted for war. The two schemes are not to be mixed, and if war steps in there is the absolute destruction of the air commerce undertaking and a loss of all the capital invested therein except as the nation, if able after a war, may shoulder indemnity for this loss.

It is not strange, therefore, that air commerce should step into the deliberations of international delegates and ask for fewer barriers and more comity, thereby having an influence on the general deliberations looking for agreement. Radio has not asked anything of anybody—it has gone on regardless of any narrowing jealousies, and from the first, regulation has been imperative to avoid chaos. Radio could not be ignored and it could not be bound, so the goodwill of nations was essential in establishing laws of operation to make its uses as smooth and uninterrupted as possible. The great social service of broadcasting has brought peoples so much closer together that new international relations have been essential.

All this has resulted in new perceptions in international law and progressive influences in the deliberations on other subjects influencing the agreement of nations. In fact, radio and aviation have given law a real jolt in their call for completely new articles of regulation. No precedents, musty or otherwise, would fit; an entirely new field was open for law-giving. Nor could the law take its time, as lawyers are wont to do. Radio especially craved action, and that right away.

This was in the new period, after the world war, when the new field of law was really thrown open. Prior to that time there had been some regulation of wireless communication between ship and shore, and now and then an abortive, frequently ludicrous, attempt to show that a community or other locality could make air laws. The law was somnolent until there was so

much buzzing in the air that something had to be done about it.

It must be said that those who have taken this thing in hand have done fairly well so far. Common sense has generally prevailed in planning regulation, whether municipal or worldwide, and the best operating and legal minds have formulated laws on operation that have given bills of rights to these two new features of civilization. Standards are fairly well known and recognized in law both as to radio and flying. The tendency in governing either use of the air is to bring about order and the greatest possible use, hence nationally selfish or jealous regulation is commonly avoided.

It is very significant of the importance achieved by the subject of the special field of law relating to air commerce and radio, that two prominent universities, both long established and conservative, are preparing to establish departments of instruction offering courses in air law. One, the University of Königsberg, in East Prussia, has quite definite ideas of the importance of this new field of law. Established in 1544, and with faculty memories of Kant, von Herder, Bessel and Neumann, it has four centuries of history behind it, yet is looking forward to becoming an influence in one of the newest and most advanced fields. The institute of air law at this university is in charge of Professor Otto Schreiber, well known as an authority on the subject and on commercial law.

Doctor Schreiber has collected a library on air law and has formulated plans for keeping in touch with legislation on the subject throughout the world. He is making an effort to secure the interest of students of air law in all countries, and hopes to make the institute an international establishment in its attendance.

The other institution is the University of Virginia, founded by Thomas Jefferson and equally conservative with the German university in its standards and ideals. It has planned the establishment of a section of air law and is collecting the nucleus of a library on the subject, and alumni and others interested have in hand the financing of this as a permanent feature of the university's law courses. The concept of these courses is twofold, primarily the great international status of the subject, and allied with this the growing importance of interstate regulation as air commerce grows in the United States.

This advanced outlook of such conservative institutions of learning as those of Virginia and Königsberg would not be taken were not these new fields in law so ready for proper means of cultivation. The university plans for courses in air law follow closely the consideration given by the American Bar Association, the Comité Juridique Internationale de l'Aviation, the International Air Navigation Convention, the international conventions on radio, the Comité Internationale de la Telegraphie sans Fil, the Union Internationale de Radiophonie, the International Chamber of Commerce and other bodies and congresses.

These authorities have made excellent progress in rewriting international law in the terms of tomorrow. International law is simply the arrangement of regulation of the dealings of nations one with another. Old relations and old ways of intercourse have changed so tremendously that it would not be unexpected if changes in law had failed to keep pace. An examination, however, of the situation shows that the law has very nearly caught up with the rapid movement forward. The whole tendency today in law is to answer constructively the public resentment against delay and archaic procedure by simplification of procedure, and the American Law Institute is making great progress toward that end. This will bring efficiency and a greater speed in our American methods of legal procedure. In fundamental restatement of the law, in uniform state laws and in uniformity of judicial procedure, there are standard programs which are being carried out expeditiously through agencies backed by the American Bar Association.

In the new field of law of the air, there is not only the absence of ancient and inflexible methods and rules and impenetrable precedents, but there is as well an irresistible demand for speed. Immediate action is required, and the lawyers who harked back to 1850 on cases supposedly affecting rights in the air were left behind so fast that they never really knew what had gone past them. This outward attitude appeared in the early days of aviation and radio, but it could not prevail because flying and broadcasting moved so fast and so far that the younger and more forward-looking legal minds were the only ones at hand when big business called for the right sort of regulation.

The basic questions of law relating to rights in the air have been fairly well arranged and established. There are some questions in dispute, but these will require practical trial of the two new mediums of commerce before the practical application can be determined. Radio broadcasting has brought about evidences of broader goodwill among nations, for this has been essential before any laws or standards could be drafted and enforced. This control through comity has prevailed rather than by enacting international laws, and so the tendency in the radio development has been toward few international agreements in law and more through unions and associational agreements of the businesses interested.

In aviation there are still very important legal attitudes to be fixed, but these mainly await the greater international establishment of air commerce. The right of an owner of realty or of property attached to the realty in the space above his property is generally recognized as restricted to the space which he puts to actual use. Otherwise there is a doctrine of free circulation of aerial navigation over private property except for necessary safety and allied restrictions to protect the persons and property below against stunt aviators and irresponsible flyers. On the other hand, this right of control of space, when it moves beyond private property and into the domain of national territory, becomes a general principle of sovereignty, and nations insist upon absolute control of the atmosphere above their own territory.

"Just after the world war," says Robert Homburg, the young Paris advocate who participated in the leading international air congresses of Europe, "the danger from the air was still present in all minds and so haunted the spirit that men endeavored first to give nations full means to defend their skies. One of the fundamental principles of the Convention of 1919 on Air Navigation was the complete and exclusive sovereignty of the State over the atmospheric space above the national territory. This principle of absolute sovereignty, over which science and progress will undoubtedly soon laugh, is the only one that had any chance of being adopted without discussion in 1919. Unhappily this principle which tends to restrain aerial

navigation is the only one found uniformly admitted in all the actual aero legislation of Europe."

Many lawyers are inclined to disagree with this statement, not merely on the ground of expediency but with the idea that nations for a long time to come will hold tenaciously to their ideas of sovereign and exclusive rights in their own territories. It is possible to meet this situation practically with concessions and adjustments which will provide uniform arrangement of airlanes and allow free circulation in peace times without thereby requiring any nation to relinquish its sovereignty. Exceptions of this sort have already been proposed.

The first steps in establishing international laws of aviation have been to find practical uniformity and adopt such regulation at first as may be made uniform. This principle has been followed nationally and locally to good effect, and if it governed the air regulation of state legislators and city councilmen in our country, it would make their efforts less ridiculous than they have been in the past ten years. In 1911 the board of supervisors of Los Angeles County, California, adopted an ordinance regulating flying in that county, which was remarkable because it included the international definitions and rules of flying promulgated at that time, made these a general basis for application around Los Angeles and left the details to a competent board. The ordinance was inspired by a popular demand to curb the wild flying which was cut loose upon Southern California by the "young aviators" there after the war. Local legislation was politically necessary, but instead of making it freakish and ineffective, the ordinance served a good purpose and was used as a model later in a number of American and Canadian cities.

This is of interest because mainly it illustrates how easily uniform principles may be written into laws and ordinances whether international or purely municipal. The same plan was followed in drafting the United States regulations which led to our present Air Commerce Act and the standardization of air commerce regulation under the Department of Commerce. Practical men like Senator Hiram Bingham, Howard Coffin and numerous others, have aided in establishing a definite commercial air policy for the United States with a well standardized system of regulation which has had acceptance by flying men in all parts of the country. If Congressmen, State legislators and city fathers will not set themselves above the Air Commerce Bureau of the Department of Commerce and other experts on air law, and will refrain from writing statutes prescribing everything from parachutes to teething rings willy-nilly upon commercial aviation, as they occasionally threaten to do, the United States will have an excellent air law system.

The subject of air law in the United States interested the Conference of Commissioners on Uniform State Laws immediately after the armistice, and the American Bar Association likewise early recognized the importance of rational legislation. Committees were appointed by these organizations. There arose in the first deliberations the problem whether regulation should be on an independent basis by the States, leaving general regulation, such as licensing and aircraft registration, to Federal direction. The first draft for a uniform aviation act for the States by the State Commissioners did not consider this problem adequately in the opinion of many aviation experts, including the Aero Club of America and the Aeronautical Chamber of Commerce. As a result the proposed act was redrafted. Of the twenty-four states which have adopted statutes governing aviation, fourteen have made their laws harmonize with the Federal Air Commerce Act, and two, California and Florida, made their air regulations void upon enactment of a Federal law.

The States which now have air laws are Arkansas, Connecticut, Delaware, Idaho, Kansas, Louisiana, Maine, Maryland, Massachusetts, Michigan, Minnesota, Nevada, New Hampshire, New Jersey North Dakota, Oregon, Pennsylvania, South Dakota, Tennessee, Utah, Vermont and Wisconsin. Of these the statutes of Arkansas, Delaware, Idaho, Maryland, Michigan, Nevada, North Dakota, Pennsylvania, South Dakota, Tennessee, Utah and Vermont are in harmony with the National Air Commerce Act.

Most of the State laws regulate acrobatics and low flying, and a number impose fees for licensing or inspection. A number provide for a State Aircraft Board and also consider authority over airports and landing places. The question of State license and inspection fees over and in addition to the Federal control is likely to be a mooted one and will probably bring to the courts some problems for decision. In Pennsylvania, Connecticut and several other States pilots and aircraft of the United States Government are specifically exempted from compliance with the State law. Several of the States require non-resident pilots flying into the State to register and otherwise comply with the State law, but generally give from fifteen to thirty days of freedom from the requirements if the pilot or aircraft is registered and licensed in the home State. The States which require periodical or primary inspection of aircraft and examination of pilots are Arkansas, Connecticut, Kansas, Maine, Massachusetts, Minnesota and Pennsylvania.

Some of the States which have no general aviation law have written into their game laws a prohibition of hunting from an airplane. This had a start when Hubert Latham, the French aviator, made a successful duck hunting trip near Los Angeles in 1911, and the California legislature immediately took cognizance by making hunting by airplane a misdemeanor. Fishing is not mentioned in any State law, although it may be noted that aircraft employees of the Goodyear factory at Los Angeles made frequent fishing excursions with a blimp dirigible in the vicinity of Santa Catalina island in 1920 and 1921.

Special laws have been made by some States to meet new phases of aviation. In California, for instance, it was made possible for municipalities or counties to establish and maintain airports outside their own county boundaries. The municipal airport of San Francisco, Mills Field, is located in San Mateo County. The District of Columbia and the Territory of Hawaii have enacted special provisions governing flying. In the District of Columbia control is placed with the Director of Traffic, and landing of aircraft is forbidden in the District except where designated by the Director or definitely established by the United States government. Hawaii has modified the uniform State law and established a Territorial Aeronautic Commission which has authority to prepare rules regarding the licensing and operating and also has control of territorially owned or leased airports.

The uniform State law, as prepared by the Air Law Committee of the American Bar Association and the Commissioners on Uniform State Laws, asserts that sovereignty in space above the State rests in the

State with the exception of the ownership of space vested in the owners of the surface beneath, subject to the right of flight. Flight is declared generally lawful unless at so low an altitude as to be of an imminently dangerous character or to interfere with an existing use of land or water or the space thereover. Dropping of objects from aircraft and hunting by aircraft are declared misdemeanors. Contracts made in the air are made of the same effect as if made on the surface. Crimes and torts in the air are covered by the laws of the State. Liability is determined by the law applicable to torts on land. Alighting upon another's property is declared illegal except in case of a forced landing, and the owner or lessee of an aircraft so landed is liable for injuries or damage thus committed. A pilot who is not the owner of the aircraft illegally landing is liable only for his own negligence.

There is already some feeling of conflict between the Federal and State supervision of aviation and air commerce. This has been energetically voiced by William P. MacCracken Jr., Assistant Secretary of Commerce for Aeronautics, who said in March, 1927:

> "Personally I feel that the states could well afford to refrain from enacting any regulatory measures until the Air Commerce regulations have been in effect for at least a year. However, if the state authorities feel that intra-state and non-commercial aircraft and personnel should comply with the requirements of the Federal regulations as to air-worthiness and competency, a simple expedient is to pass a State law requiring that all aircraft operating within the State should comply with the Federal law relating to interstate and foreign commerce. Of course you understand that the air traffic rules promulgated pursuant to authority contained in the Air Commerce Act of 1926, apply equally to all air navigation, both civil and military, commercial and non-commercial, and, therefore, there is no jurisdiction in any State or local authority to enact any air traffic rules.
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> "The Air Commerce Act is a comprehensive law regulating interstate and foreign air navigation. It requires the licensing of aircraft and airmen engaged in such commerce, and applies the air traffic rules to all flying, military and civil, intrastate, foreign and interstate. The licensing provisions require only aircraft and airmen engaged in carrying persons or property for hire, or the mails, or in the conduct of furtherance of a business either across State lines or as part of an interstate carriage or transaction, to obtain a license, but others may do so. The air traffic rules are directed to the navigation, protection and identification of aircraft."

This sweeping pronouncement as to the Federal powers under the Air Commerce Act is being variously received. The Board of County Commissioners of Cook County, Illinois, agrees and has passed resolutions prohibiting any flying of aircraft in that county "excepting such aircraft as has been inspected and licensed by the Department of Commerce of the United States, and when operated by pilots possessing licenses issued by the Department of Commerce of the United States." State authorities are more generally inclined to take issue and not to change any statutes already in force. The California Railroad Commission has indicated unofficially that its members believe the authority given the Commission over traffic generally, although prepared without thought of air traffic, is sufficient to cover air commerce in that State. Some of the States will not give up their regulation of intrastate flying, including commercial flying, without contesting the attitude of the Department of Commerce, and the Uniform State Law is designed to cover this field.

The tendency in international agreements is toward greater safety and wider uniformity. The American Bar Association, at its 1927 meeting, approved the proposal of its Air Law Committee urging expansion of the powers of the Federal Government to make certain the ability to prohibit or regulate transoceanic flying attempts. The Air Transport Committee of the International Chamber of Commerce adopted conventions prepared by the expert jurists of the Committee, Professor Otto Schreiber, of Germany; M. Henry Fabry, of France; and Major K. M. Beaumont, of Great Britain, and these were approved by the congress. The conventions, the experts said, were "in favor of the international unification of private air law, which appears absolutely necessary for the development of commercial air transport," and "correspond to the three essential needs of commercial air transport."

These important conventions had to do with (1) the liability of operators of aircraft for damages to persons or property not carried on the aircraft and for damages caused by collision between aircraft; (2) insurance on navigators, pilots and crews of aircraft engaged in international traffic, and (3) international regulation of air consignment notes and preparation of a uniform consignment note for international transport of express and freight by aircraft. A rather interesting consideration of the third convention, which was prepared by Major Beaumont, was rejection of the idea that the maritime bill of lading could be followed and the rules of sea transport adopted. This was deemed impractical because the maritime bill of lading represents goods in slow transit and is the authority for transfer of title of the goods while still in transit. This definite value attaching obviously imposes a definite liability upon the sea carrier. Air transport is so rapid that the bill of lading is not fair, and the liabilities it imposes upon carriers on the sea should not be forced upon airway carriers. It is provided in the convention that "no copy of a consignment note shall have the value of a bill of lading."

It was naturally supposed at first that marine law with its years of use would furnish the principal basis for air law. This did not prove out, mainly because air carriers move so fast over both land and sea and may pass over so many international boundaries that air law must be built up with its own standards. One very important feature has been presented by maritime law, however, and has been fully understood by men engaged in studying the needs of air law. This is the fact that maritime law has been allowed to grow through the experience of many years and build itself up irregularly as time and progress have dictated. From this many conflicts and misconceptions have arisen. Observance of this has impressed upon the makers of air law the greater necessity for establishing complete standards and giving air commerce full fledged wings of law.

An excellent start in the regulation of radio was made in 1912 through an international convention at London. General regulations were agreed upon, even to inclusion of radio-telegraphy on air craft, the extensive use of which was foreseen at that time. It was agreed that conferences for revision of the regulations would be held every five years, but in 1917 the war had intervened, and it was not until October, 1927, that an international conference on radio regulations could be held, although international radio meetings on other phases than adoption of regulations were held at various times. The conference was held at Washington, October, 1927, on invitation of the United States. Nearly fifty countries, dominions or lesser states were represented, as were the radio com-

panies and other leading organizations interested in radio.

An interesting proposal made to the Conference by the United States was that a division be made between subjects of concern to sovereign governments as governments on the one hand and subjects of concern to managers and operators of services on the other hand. The first class would comprehend such subjects as protection of public interest, governmental obligations with regard to marine and aerial navigation and the safety of human life, secrecy of messages, avoiding interference and other matters where the government has a real concern. The other class would deal with methods of operation of a more or less technical nature, and which may be left properly to managements. These would include tariffs, operating procedure and other matters related to the technical development of the art.

This idea was first suggested at the telegraph conference at St. Petersburg in 1875, and has cropped out in other conferences of an international nature. It seems now more likely of fruition as established policy than ever before, both in the fields of radio and aviation. The European air commerce companies have encouraged this in working together on interline arrangements.

The problem of insurance in relation to airway operation is one properly left to the air commerce companies themselves, and with the consideration that already has been given this by insurance companies and aircraft insurance experts, it is not likely that governments will go further than to provide that certain kinds of insurance and bonds be made compulsory. So far the operating airways seem anxious to meet this problem squarely and even to go beyond what may be considered essential. The Deutsche Luft Hansa corporation has taken this in hand by furnishing every passenger with an insurance policy for twelve thousand marks gold for the period of travel.

It is fortunate that the new structure of international law is being built by men who know the air as well as the law. Doctrinaires and precedent-followers were soon left behind, and the development has been guided in aviation by men familiar with international law who saw service during the world war. Such men as the young Parisian advocate, Robert Homburg; Dr. Otto Schreiber, who has been placed at the head of the University of Königsberg's Institute of Air Law; George G. Bogert, of the Chicago University Law School, D. W. Iddings, former president of the Ohio Bar Association and Chester W. Cuthell, my associates on the Air Law Committee of the American Bar Association; Major K. M. Beaumont, D. S. O., of London; Pierre Etienne Flandin, under-Secretary of State for Air for France; and numerous others, bring to their work a well-balanced knowledge on all phases of the field. There are so many of these men who have given their time and technical abilities that a full list is out of the question. This means that this new field of law will be covered in sound accord with statutory and constitutional laws of nations and will be immediately and continuously responsive to practical requirements of the flying world and its patrons.

Yet there is much of great importance to be done. In the United States we have seen the development of aviation from an embryonic stage in the War and Navy Departments, and more recently in the Department of Commerce, and aviation is connected with

perhaps a dozen other governmental agencies. In Europe aviation is a centralized force, as in Italy, where Mussolini actively directs all that pertains to the air forces of his country. Great Britain, Spain, Denmark, Germany and France have all unified their air forces, but in the United States mere sporadic attempts have been made towards unification. The tendency throughout the world today is to become air-minded, but the novelty of flying has worn off to some extent and so the American people have largely dulled their consciousness in this direction. America needs a greater air consciousness.

NEWS OF STATE AND LOCAL BAR ASSOCIATIONS

Arizona

Arizona Bar Votes for Incorporation by Legislative Act

Thomas G. Norris of Prescott was elected president and James E. Nelson of Phoenix was re-elected secretary of the Arizona Bar Association at the close of the annual meeting. The Association indorsed the proposal urged by Thomas Ridgeway, president of the California Bar Association, for incorporating the Arizona bar under a special law to be asked of the legislature.

Numerous resolutions dealing with practice and procedure were passed. At the suggestion of Mrs. Nellie Bush, a house member from Yuma county, the association will present to the eighth legislature a recommendation that it increase salaries of superior judges to $7500 a year and those of lesser rank in proportion.

The new executive board consists of P. W. O'Sullivan, John A. Ellis and Frank E. Flynn, all of Prescott.

A number of the resolutions passed today were those offered by the Arizona Superior Judges Association, which met here Friday to prepare recommendations.

Among the important resolutions passed at the annual meeting were the following:

1. To provide a commission of supreme and superior judges to lay down rules of court procedure in civil cases, such rules to supersede legislative rules where there are conflicts.

2. To delegate to court clerks the authority to make and sign ex-parte orders in probate cases not requiring judicial decisions.

3. To alter provisions for disqualifying trial judges by compelling filing of affidavits of bias and prejudice at least five days prior to the date of trial; to confer on the disqualified judge the power to retain jurisdiction for setting new date of trial and assigning case to another judge and to oblige the attorneys to state the grounds for believing the court "biased or prejudiced."

4. To prevent the board of pardons and paroles from commuting an indeterminate sentence, thus making a prisoner eligible to pardon or parole prior to expiration of the court's minimum sentence.

5. To incorporate the Arizona bar.

6. To raise salaries of superior judges, and

7. Three resolutions expressing the sentiments of the association over the deaths of three members, James P. Lavin, president of the Arizona Bar, William H. Stillwell, and John H. Campbell.

The Arizona association being without a head, borrowed from the Yavapai Bar its president, R. B. Westervelt, and placed him in charge of the meeting.

The lawyers convened in the forenoon at the superior court room, not many in number, but representative of the entire state. Their first business was the memorial to their deceased members, and then they listened to an advocacy of the California Bar Association plan, now in vogue in four states, for the incorporation of the legal fraternity by states.

This method, it was pointed out, would place the responsibility for the admission of attorneys in the hands of the members of the profession, and would give the corporation that self-governing right to dictate the discipline of the practitioners and to adopt the rules of conduct which must guide all practice.

Mr. Ridgeway, whose remarks "sold" the idea which had been discussed generally throughout the state during the past year, left on the evening train for his home in Los Angeles, and so was unable to attend the evening banquet.

Among those present was Hon Gurney Newlin, president of the American Bar Association.

Colorado

Lawyers and Doctors Hold Meeting

In the hurry and scurry of this mechanistic age, people generally have forgotten that there exists any such thing as a "learned profession." And it would not be surprising, therefore, if the bond of fellowship between Law and Medicine had grown as loose as the alleged morals of the time.

But that such a bond still remains was amply demonstrated at the joint meeting of the Denver Bar Association and the Denver County Medical Association, held at the University Club in Denver on the evening of December seventeenth.

Following a dinner, during which there were spasmodic bursts of song and humor, a problem of mutual interest to the two professions was discussed—"Crime."

Dr. Franklin G. Ebaugh, director of the Colorado Psycopathic Hospital, was the principal speaker and outlined in some detail a plan for the mitigation of crime through psychiatric examination, study and treatment of the criminal. To illustrate his theory, he cited the notorious Hickman, whose last atrocious crime, Dr. Ebaugh maintained, might have been averted had Hickman been subjected to psychiatric examination at earlier stages in his criminal career.

It was interesting to the lawyers to get the psychiatrist's viewpoint and the only regrettable feature of the evening was the absence, because of illness, of Mr. William W. Grant, who was to have given the doctors the lawyer's viewpoint.

All things considered, however, this medical-legal dinner of the Denver Bar proved itself decidedly worth-while and, if the experiment has not been tried elsewhere, we believe it will bring to others, as it has to us, a closer understanding and comradeship between two professions with many ideals and traditions in common.

JOSEPH C. SAMPSON.

Illinois

Mid-Year Meeting of State Bar

Several matters of considerable interest to the lawyers of the state were presented at the annual mid-year meeting of the Illinois State Bar Association held at Chicago on November 30, 1928, President Rush C. Butler, presiding.

Judge R. K. Welsh of Rockford reported that the Committee on the Official Bulletin was considering the possibility of issuing a more pretentious bulletin, not a law review, but a law association journal, personal and non-technical in character.

The repeal of the recent amendment to the Practice Act, which makes it possible for any case to go to the Supreme Court on certiorari, and the restoration of the $1,000 limitation, was discussed by Mr. Charles V. O'Hern of Peoria, Chairman of the Committee on Organization, and also by E. J. Verlie of Alton, for the Committee on Judicial Administration. Mr. Verlie also presented a statement of the customary rules of etiquette while in the Supreme Court room. His committee is considering a recommendation that the arbitrators of the Industrial Commission should have to be licensed attorneys.

William E. Britten of Urbana reported as Chairman of the Committee on Classification of Statutes that his committee has been co-operating with the Legislative Reference Bureau in preparing a tentative list of new chapter headings for the State statutes. This list will be submitted in printed form to the entire bar of the state for suggestions and criticisms.

In this connection the report of Dean Albert J. Harno of Urbana, chairman of the Committee on Uniform State Laws, is of special interest. The committee recommended that the following uniform acts should be brought before the next session of the State Legislature: Uniform Conditional Sales Act, Federal Tax Lien Act, Federal Guardianship Act, Declaratory Judgment Act and that part of the Uniform Motor

Vehicle Act which applies to the licensing of drivers.

Chairman John F. Voigt of the Committee on Corporations Practising Law called attention to the case now pending in the Supreme Court against the Peoples Stock Yards State Bank, in which the State Bar Association and the Chicago Bar Association have acted jointly. The decision in this case will probably become an important precedent and may have far-reaching effects.

Judge James S. Baldwin of Decatur reported that the Committee on Re-organization has submitted to the various federations of bar associations throughout the state a plan of organization through which the annual meeting of the State association will be composed of delegates from the local associations instead of relying upon the general attendance of the bar association membership. By having three delegates from each local association, the annual meeting would be more representative of the whole State.

Major Edgar B. Tolman reported for the Committee on the American Law Institute that the first part of the restatement of the law of contracts has been approved by the Institute and that Illinois is undertaking the annotation of the statement. When this work has been completed it will be sent out in pamphlet form to the lawyers of the state for criticisms and suggestions. It is hoped that the final draft will be used by attorneys generally to determine its practical value.

Thomas J. Norton of Chicago, Chairman of the Committee on American Citizenship, presented an able and thoroughgoing report of the activity of his committee in connection with the teaching of the Constitution in the schools of this State. It is suggested that anyone especially interested in this work should communicate with Mr. Norton.

The Committee on Criminal Law Enforcement, by its chairman, Amos C. Miller of Chicago, reported that it is operating through the Illinois Association for Criminal Justice, which is completing a survey relating to criminal law enforcement and the cause of crime.

The last pamphlet on fees and schedules of charges has been gone over in detail by the committee in that subject, according to Lawrence C. Johnson of Galva, chairman. It was suggested that the revised schedule be submitted to members of the association before any action was taken.

Andrew R. Sheriff of Chicago reported that the Illinois Bar Foundation now has total funds invested in the amount of $18,200, which ought to be increased to at least $50,000 by voluntary contributions if the association will establish the necessary machinery for obtaining them.

Nebraska

Nebraska Bar Indorses Judicial Council and Higher Educational Standards

The Nebraska State Bar Association held its twenty-ninth annual meeting at Omaha on December 27 and 28, 1928. Sixty persons were admitted to membership, making the total membership of the association 1,250.

President Robert W. Devoe, of Lincoln, delivered the president's annual address on "An Optional Alternative for the Jury in Civil Cases." General Nathan William MacChesney, of Chicago, gave a highly interesting and instructive address on "The Developing Law of the Air." On December 28, the Association was favored by an address on "The Judicial Task," by Hon. Truman S. Stevens, Chief Justice of the Supreme Court of Iowa. Charles M. Bracelen, of New York City, general counsel and vice-president of the American Telephone and Telegraph Co., who was to have been on the program, was prevented from attending by the death of his mother and his place was graciously filled by Dr. Frank G. Smith of Omaha, who spoke on "Fundamental Factors in a Satisfying Human Experience."

The Association indorsed, and directed the introduction of a bill in the present legislative session creating, a Judicial Council; a bill providing for declaratory judgments; and a bill increasing educational requirements for admission to the bar to the American Bar Association standards, such as was sponsored by the Association at the preceding session of the legislature and which was passed by the lower House, but failed of passage in the Senate.

A Special Committee on the Division of the Federal Eighth Circuit, appointed for the purpose of securing recognition for Nebraska in any proposed division of the Circuit, and for Omaha as a place for holding court sessions, was given a vote of approval of its efforts and was directed to take such steps on behalf of the Association as it deemed necessary for the accomplishment of its purpose.

The Association indorsed also a proposal to increase the salaries of judges and court reporters, and a proposal for the trial together of defendants jointly charged with crime, except for good cause shown.

The annual banquet was held on the evening of December 28, at Hotel Fontenelle. Frank E. Randall, of Omaha, served as toastmaster and responses were made by C. N. Wright, of Scottsbluff; Carl Herring, of Omaha; Hon. T. S. Stevens, of Des Moines; H. T. Harrison, of Little Rock, Ark.; H. H. Wilson, of Lincoln, and Gen. J. J. Pershing. General Pershing was elected to honorary life membership in the Association during the meeting.

The officers of the Association for 1929 are: President, Anan Raymond, Omaha; Vice-Presidents, R. F. Stout, Lincoln; C. C. Fraizer, Aurora; Roland V. Rodman, Kimball; Secretary, Harvey Johnsen, Omaha; Treasurer, Virgil J. Haggart, Omaha.

Harvey Johnsen, Secretary.

Washington

County Association Has Successful Year

The Snohomish County Bar Association, under the direction of Hon. W. P. Bell as President, has just closed one of the best year's work it has ever had as an organized Association.

During the year it has held forty-one regular meetings and several special meetings, with no meetings during the summer months. Four members of the Bar have passed on during the year, to stand before another Bar. Special memorial services were held for each deceased member, with the President and the Judges of the Superior Court on the Bench in open Court.

Election of new officers for the ensuing year was had on the last session of the year. The election resulted in Mr. L. A. Merrick, President; Alex. Vierhus, Vice-President; Verne Henry, Secretary, and D. W. Locke, as Treasurer, being chosen.

Each year the Association holds its annual banquet on Washington's birthday, which is usually largely attended by members of the Bar with their ladies. As guests the members of the Supreme Court usually attend with the Secretary and President of the State Bar Association. This year the Hon. Jeremiah Neterer, Judge of the United States District Court, at Seattle, Washington, was the principal speaker.

The report of the Treasurer shows that the finances of the Association are in an unusually fine condition with a paid-up membership of approximately sixty-three members. At each meeting a local speaker addresses the meeting, and in this way many inspirational and well developed speeches are heard in the course of the year. It is expected that the new officers will carry on in much the same way as their predecessors and the new year holds out great promise.

S. J. BROOKS, Secretary.

West Virginia

State Bar Transacts Important Business

The forty-second annual meeting of the West Virginia Bar Association was held in Fairmont, West Virginia, on October fourth and fifth. The meeting was remarkable for the largest attendance in the history of the Association. A very excellent program consisting of papers by members of the bar and reports of committees completely filled the days of the session.

The outside speakers invited to give papers and reports were the Honorable John J. Parker, United States Circuit Judge, who gave the principal address at the annual dinner on the subject of "The Lawyer in a Democracy," and Merton L. Ferson, Dean of the Cincinnati Law School, who gave a paper entitled "Comments on the Restatement of the Law of Contracts by the American Law Institute."

Some time ago a revised code was prepared at considerable expense on the recommendation of the West Virginia Bar Association to be submitted to the Legislature. Committees of the Association and the Executive Council of the Bar Association have done a great deal of work on this code, and a good deal of the time of the Association at the meeting was taken up discussing changes and amendments. A plan of organization to further the passage of this code through the Legislature was approved by the Association.

A proposed amendment to the constitution of West Virginia was approved by the Association which transfers jurisdiction in matters of probate from the county courts to the circuit court. The present method of probate procedure in West Virginia has been the subject of considerable unfavorable criti-

cism because the county courts which have dealt with probate matters are not judicial bodies but are boards of commissioners who need not be lawyers. The amendment proposed by the Bar Association will be unquestionably a step forward in improving the procedure. The Bar Association will take active steps in procuring the submission of the amendment to the people of West Virginia at the coming Legislature.

A resolution was also passed requesting the Law School faculty to study and report on a proposed revision of the rules of pleading in West Virginia. This resolution is significant enough to be worthy of particular comment. It will represent an attempt on the part of the West Virginia Bar Association to have the Law School faculty perform a task for West Virginia similar to that undertaken by the American Law Institute in its national restatement of law. This plan was further carried out by the indorsement of the report of the Committee on Legal Education, which recommended a systematic plan of work by the faculty of the College of Law on problems of importance to the state of West Virginia. These problems are to be selected and approved by the Bar Association, and the reports of this work are to be submitted to the Bar Association for their recommendation and action.

The following officers were elected: President, Daniel J. F. Strother, Welch; 1st V. P., Frank C. Haymond, Fairmont; 2nd, Harry H. Byrer, Martinsburg; 3rd, E. G. Smith, Clarksburg; 4th, Harry Scherr, Huntington; 5th, A. W. Reynolds, Jr., Princeton; 6th, J. Hunter McClintic, Charleston; Secretary, Austin V. Wood, Wheeling; Treasurer, I. M. Adams, Jr., Parkersburg; Librarian, W. V. Mathews, Charleston; Executive Council, David C. Howard, Charleston; S. P. Bell, Spencer; James M. Guiher, Clarksburg; J. Harold Brennan, Wheeling.

The new President, Mr. Daniel James French Strother, was born in Washington, Virginia, on June 29, 1872. He was admitted to the bar in 1893. He is a member of the law firm of Anderson, Strother, Hughes and Curd. His interests are varied. Besides his law practice he is President of the First National Bank of Welch, West Virginia, and the Citizens Bank of War, West Virginia.

THURMAN W. ARNOLD,
Dean of the College of Law, West Virginia University.

Miscellaneous

Miscellaneous

The Amarillo (Texas) Bar Association held its tenth annual banquet on the evening of December 14th. A unique feature of the affair was the part taken by the women, who gave the entire program with the exception of the principal address. Musical numbers were interspersed with toasts as follows: "Are Lawyers Human?", Mrs. S. E. Fitch; "Lawyers as Husbands," Mrs. J. B. Dooley; "Are Lawyers Sincere?", Mrs. H. L. Adams; "Do Lawyers Lie?", Mrs. Lloyd Fletcher. The following officers were elected for the next year: Ray C.

Johnson, president; Porter Underwood, vice-president; J. M. Oakes, secretary-treasurer; Herman Pipkin, S. A. L. Morgan and Thomas F. Turner, executive committee.

Stephen Brophy was elected president of the newly organized Lucas County (Ohio) Bar Association. Other officers elected include James Nye, vice-president; secretary, John E. Connell, and treasurer, J. J. Waldvogel.

At a meeting of the Richardson County (Neb.) Bar Association held in December, the following officers were chosen: R. C. James, president; F. N. Prout, vice president (re-elected); Lauritz Ries, secretary, and Joe Gagnon, treasurer.

Will Hart was chosen president of the Travis County (Texas) Bar Association at a meeting of the organization in December. Judge C. L. Black was made vice-president and Robert N. Turpin, secretary-treasurer. Gen. W. A. Keeling, Judge William Blakeslee and George Mendell, Jr. were chosen as directors.

The following officers were elected at the recent annual meeting of the Navarro County (Texas) Bar Association: Beauford H. Jester (re-elected), president; Warren Hicks, vice-president; C. E. McWilliams, treasurer; W. W. Harris (re-elected), secretary.

Rocsoe P. Conkling was elected president of the Buchanan County (Mo.) Bar Association at its meeting on December 22. Other officers elected were as follows: W. H. Utz, first vice-president; R. L. Douglas, second vice-president; Edward B. Wilkinson, secretary, and W. J. Sherwood, treasurer.

Advertising by Lawyers

Editor,

AMERICAN BAR ASSOCIATION JOURNAL:

For several years I have conducted a course in Legal Ethics in the Yale School of Law, and one of the subjects discussed has been the canon of the American Bar Association on the subject of advertising by lawyers.

In reading some of the literature on the subject, I have been unable to find much discussion of the reason for the prohibition against advertising, other than that advertising does not comport with the dignity of the profession, or that, while permissible in business, it is not permissible in a profession.

While I appreciate the value of dignity in the profession, these statements seem to me to do little, if anything, more than to restate the canon in another form. They do not explain why it is undignified for a lawyer to advertise, or why a professional man may not advertise, while a business man may. However, in the various discussions I have found suggestions along the following lines:

1. That advertisements, unless kept within narrow limits, like any other form of solicitation, tend to stir up litigation, and such tendency is against the public interest.

2. That if there were no restrictions on advertisements, the least capable and least honorable lawyers would be apt to publish the most extravagant and alluring material about themselves, and that the harm which would result would, in large measure, fall on the ignorant and on those least able to afford it.

3. That the temptation would be strong to hold out as inducements for employment, assurances of success, or of satisfaction to the client, which assurances could not be realized, and that the giving of such assurances would materially increase the temptation to use ill means to secure the end desired by the client.

In other words, the reasons for the rule, and for the conclusion that it is desirable to prohibit advertising entirely, or to limit it within such narrow bounds that it will not admit of abuse, are based on the possibility and probability that this means of publicity, if permitted, will be abused.

I should be very grateful of any suggestions as to other reasons for the prohibition.

I share in the conviction that the practice should be limited as the canon limits it, but I find it difficult to formulate the reasons for this instinctive conviction. HARRISON HEWITT.

New Haven, Conn., Nov. 23, 1928.

Wanted Job—Harvard University Law School, graduates in class of 1930. Wishes to be associated with first class legal firm. Dishman, Tinsley and Dishman, Barbourville, Ky.

FOR SALE.—In order to liquidate estate. Excellent legal practice in thriving Northern Wisconsin city of ten thousand population. Can arrange partnership if desired. Address F. N. B., care this Publication.

APPLICATION FOR MEMBERSHIP

To The American Bar Association,
209 S. La Salle St., Chicago, Ill. .....192...

I hereby make application for membership in the Association and certify the following:
(a. I have been a member in good standing of the Bar of the

State (or States) of.....since .....

I am a member of the following Associations of the Bar.....
(b) I am White ☐ Indian ☐ Mongolian ☐ Negro ☐

NAME.....

MAILING ADDRESS.....

CITY and STATE.....

Endorsed by.....:...Address.....

Check to the order of American Bar Association for $.....is attached.

If this application is made between July 1 and September 30, the check should be for $8.00; if between October 1 and December 31, for $6.00; if between January 1 and March 31, for $4.00, and if between April 1 and June 30 for $2.00.

A member receives the monthly American Bar Association Journal beginning with the month of his election, and the report of the annual meeting of the Association. This report is a record of the activities of the Association and contains a list of the members.